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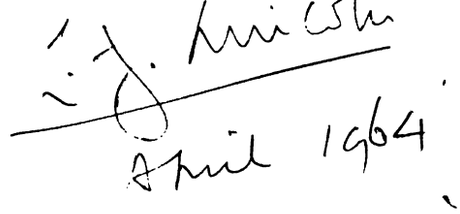

April 1964

DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT

AND

BANKRUPTCY COURT

OF

MAURITIUS.

ARRÊTS

DE

LA COUR SUPRÊME, DE LA COUR DE VICE-AMIRAUTÉ

ET DE

LA COUR DES FAILLITES

DE

L'ILE MAURICE

INDEX OF MATTERS FOR 1879

EDITED BY ANATOLE SAUZIER

ADVOCATE

MAURITIUS:

GENERAL STEAM PRINTING COMPANY, GOVERNMENT STREET

1880

ALPHABETICAL LIST OF MATTERS

FOR

THE YEAR 1879

DEFENDANTS AND PLAINTIFFS

ALPHABETICAL LIST OF CASES

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OF

MAURITIUS

EDITED

BY ANATOLE SAUZIER, ADVOCATE

1879.

BAIL COURT

—

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE,—CHARGE OF EMBEZZLEMENT,—ARTICLE 333 OF PENAL CODE.

Held that, after a careful examination of the facts of this case and of the law bearing upon them, neither the facts alleged in the information nor those proved to the Magistrate amounted to a contract of mandat *or* dépôt, *the fraudulent violation of which would constitute the offence of embezzlement;*

That it was not necessary that the different elements which constitute the offence of embezzlement should be mentioned in the judgment of the District Magistrate, but that they must be found in the information and in the evidence;

That as these elements were not to be found in the Record of this case, the Court could not otherwise consider that the fraudulent act which the Magistrate wished to punish was not the offence of embezzlement described by Article 333 *of the Penal Code.*

The Court accordingly quashed the conviction of the District Magistrate without costs.

PAINTER,—Appellant

versus

THE QUEEN,—Respondent

—

Before

His Honor E. J. LECLÉZIO,—Acting Second Puisne Judge

—

L. A. THIBAUD,—Of Counsel for Appellant
H. THATCHER,—Attorney for the same

L. COX, Acting Substitute Procureur General
Of Counsel for Respondent
J. BOUCHET,—Attorney for the same

21*st January* 1879

This is an appeal from a conviction of a District Magistrate sentencing the Appellant to two months' imprisonment for embezzlement.

According to the information in the Record, one Jules Gautier charged one Henry Painter with having on the 18th April 1878, in the latter's house, in Port Louis, embezzled a bill or promissory note, signed by

Painter and wife and of which Gautier was the bearer, and which, after having been acquitted for the balance remaining due upon it " was delivered on the said day to the " said accused in pursuance of a trust with the " condition that the same be returned or used " for a special purpose, to wit : it having " been previously agreed between him, the " said Gautier, and the said Painter, that the " said Painter would on the day aforesaid, " pay the balance which remained due upon " the said bill or promissory note in principal " only, the said Gautier entered the said " Painter's house for the purpose of receiving " such payment. Whereupon the said Painter " said to the said Gautier, that he the said " Painter was ready to pay him the said " Gautier, and asked him the said Gautier, " to write an acquittance in due form across " the said bill or promissory note, and the " said Gautier having written such acquit- " tance, handed over the said bill or promis- " sory note to the said Painter, it being well " understood that the ink of the said acquit- " tance should be dried, and the said bill " after the ink dried, should be returned to " the said Gautier, if the aforesaid balance " was not paid, and the said Gautier avers " that neither the said balance was paid nor " the bill was returned to him, and therefore " that the said Painter has embezzled the sum " as aforesaid of the said Jules Gautier."

Gautier in his evidence before the Magistrate thus describes what took place in Painter's house: " I did go at 4.30 P. M. and " having found Painter at home, I acquitted " the promissory note and handed it over to " him, he went out a moment and put some " dust over my writing and signature and " then passed into an inner apartment. I " heard the noise of drawers being opened " and locked again, I thought he was getting " the money to pay me with, but presently " he came to me and said quietly: Well, Mr " Gautier, I am satisfied—I have your note " acquitted, you have been paid and it is all " right. What do you mean, I exclaimed, " are you going to rob me of my money in " that way, give me back my note, you thief, " you swindler. He cooly answered he would " not return it. I, at once, went to the " nearest Police Station and stated what had " occurred between us."

The principal reason of appeal argued before me is worded in these terms : " Be- " cause the Plaintiff in the Court below in " his information, alleged that the embezzle- " ment had been committed through the " violation by Appellant of a *mandat* (trust) " and there was no evidence whatsoever ad- " duced to the Magistrate of any such con- " tract of *mandat* trust, having ever existed " between Plaintiff in the Court below and " the Appellant."

The learned Substitute argued that the word used in the information " trust " would apply as well to *dépôt* as to *mandat*, that the contract resulting from the facts proved, is either a *dépôt* or a *mandat*. That the text of the Penal Code which is to be followed is the French text, and altho' in the English text the word *trust* seems to be the corresponding translation of the word *mandat* in Art. 333 of the Penal Code, the Court cannot be bound by translations more or less correct, that at all events it is not because a wrong name has been given to a contract in the information that a guilty party should escape.

To this *Thibaud*, for Appellant, replied that the evidence did not show any more a contract of *dépôt* than one of mandat, and that the facts proved, if complainant was to be believed, although very reprehensible, did not amount to an offence of embezzlement such as it is contemplated by our Criminal Law.

There is no doubt that the Court must be satisfied that the elements which constitute the offence called " embezzlement," such as is described by the first paragraph of Art. 333 of our Penal Code, have been clearly established. The property embezzled must be shown to have been handed over " à titre de louage, de dépôt, de mandat, ou pour un travail salarié." There is not in law any embezzlement or " abus de confiance " unless the property has been entrusted in pursuance of one of these contracts or agreements, tacit or express. Can it be said, (admitting, as the Magistrate did, the facts related by Gautier as true) that the bill after having been acquitted, was entrusted to Painter in pursuance of a *mandat* or of a *dépôt*. It was argued that the *mandat* consisted in entrusting Painter with the care of putting some dust on the writing and signature of Gautier to dry the ink, but this was not very strongly insisted upon, and the learned Substitute preferred to lay greater stress upon the tacit agreement that must have existed between the parties, according to which the bill was to be returned to Gautier if the money was not paid, and he said that the handing over of the bill in presence of this tacit understanding amounted to a contract of *dépôt*."

After serious examination of the facts of this case and of the law bearing upon them, I have come to the conclusion that neither the facts alleged in the information nor those proved to the Magistrate amount to a " con-

tract of mandat or of dépot," the fraudulent violation of which would constitute the offence of embezzlement. *Dalloz Vo. Abus de confiance, No.* 5 says: "On ne doit pas perdre "de vue dans l'application de l'Article 408 "(which is our Article 333) la disposition de "l'Article 1915 du Code Civil qui définit le "dépôt un acte par lequel on reçoit la chose "d'autrui, à la charge de la garder et de la "restituer en nature. Aussi a-t-il été jugé "qu'il ne peut y avoir dépôt dans le sens "légal de ce mot, que lorsque la garde et la "conservation de la chose qui en est l'objet "ont été le but principal et déterminant de "la tradition &c." See also *F. Elie*, under *Article* 408 *No.* 2067.

When Gautier, after having acquitted the bill, gave it to Painter, the latter received it not for the purpose of keeping it for Gautier and returning it to him, but as voucher of the acquittance in exchange of which he was to pay the balance due by him upon the bill. There is no doubt that if he did not pay the balance, as the Magistrate was satisfied from the evidence he did not, he acted fraudulently and dishonestly by not returning the discharged bill, but such act on his part, altho' it may be the violation of a promise, cannot legally be considered as the violation of a contract of *dépôt*, because there had really been no *dépôt* in the legal sense of the word. Gautier had confidence in the honesty of Painter and parted possession with his title before receiving the money due to him, but he cannot be said to have deposited such title in the hands of Painter for the purposes mentioned in Article 1915 of the Civil Code.

If we examine the facts charged and proved by the light of the contract of *mandat*, it is not possible either to consider the tacit agreement between parties as one of agency, unless we suppose that Gautier entrusted the discharged bill to Painter merely for the purpose of putting some dust on the writing in order to dry the ink, and this operation completed, that Painter was to return the bill to Gautier immediately afterwards; we must come to the same conclusion we arrived at when examining the possibility of a contract of *dépôt*. It would be puerile to think that Gautier parted with the said bill with the simple object of giving to Painter the mandate of putting some dust taken from the yard upon his writing, and indeed the evidence of Gautier does not imply such a contract of *mandat*, he simply says: "I "acquitted the promissory note and gave it "over to him. He went out a moment and "put some dust over my writing and signa- "ture, and then passed into an inner apart- "ment. I heard the noise of drawers being "opened, and locked again. I thought he "was getting the money to pay me with, &c." This shows that no mandate was given by Gautier to Painter or intended between them, but that Gautier relying upon the promise of payment gave his discharge, and it was only when his debtor came back without the money, that he saw that he had been deceived.

If the mandate has been one for drying the ink with dust taken from the yard, on the understanding that the bill was to be returned to Gautier immediately afterwards, he would not have allowed Painter to enter into an inner apartment with his bill, and waited patiently for his return, listening to the noise of drawers opened and locked again and remaining under the belief, till the last moment, that he would be paid. From Gautier's own explanation, it is clear that there was no *mandat* or no *dépôt* agreed upon at the time of the handing over of the acquittance to Painter, but an expectation based upon a promise of Painter to pay the balance due, and the violation of such promise coupled with a fraudulent keeping of the discharged bill. Failing therefore to see in the facts charged and proved the elements which constitute the offence of embezzlement according to the first paragraph of Article 333 of our Penal Code, I must quash the conviction.

I must add that finding the points argued of a delicate nature, I conferred with my brother Judges, the Acting Chief Judge and Mr Justice Pellereau, and that they agree with the conclusions I have come to. Such conclusions do not in any way interfere with the latitude which has been left to District Magistrates on questions of facts, they are simply the result of the power which tribunals judging like the Court of Cassation have constantly reserved for themselves, that of examining whether the inferior Courts have drawn the truly legal consequence from facts charged and proved and properly appreciated the true judicial nature of contracts. See Cass. S. V. 51, 1, 625—52, 1, 374—62, 1, 625 and 67, 1, 188. It is the power that I have exercised here, accepting as true all the facts alleged and proved to the satisfaction of the Magistrate as disclosed by him in his written judgment. I have drawn from them legal consequences which are not punishable by Article 333 of our Penal Code. This article has not had in view all kinds of (*abus de confiance*) breaches of trust, amongst the numerous frauds which may accompany the formation and execution of contracts. It punishes the gravest of them or those that can be more easily proved and clearly established, and to quote the words of F. Hélie: "La première règle de la matière est donc "que l'abus de confiance n'est punissable

" que dans les cas que la loi a expressément " prévus et sous les conditions qu'elle a pres- " crites," and after enumerating those conditions he adds that if they are not to be met with successively in the judgment, " la péna- " lité n'aurait plus de base, le Juge punirait " peut être un acte frauduleux, mais rien ne " prouverait que cet acte est le délit que la " loi a prévu ou voulu punir."

In our system it is not necessary that the different elements which constitute the offence should be mentioned in the judgment, but they must be found in the information and in the evidence ; and as they do not all appear in the Record now before me, I cannot do otherwise than consider that the fraudulent act which the Magistrate wished to punish is not the offence of embezzlement described by Article 333 of the Penal Code.

Conviction quashed without costs.

BAIL COURT

APPEAL FROM JUDGMENT OF DISTRICT JUDGE OF SEYCHELLES. INCOMPETENCY OF THE SAME TO ORDER THE DETENTION OF A SHIP. AFFIXING OF SEALS ON TACKLE GEAR &a. OF A SHIP. SALE BY LICITATION THEREOF.

Held that the District Judge of Seychelles had no jurisdiction to order that a ship be detained in the harbour of Port Victoria until the Sale by Licitation of the said ship ;

That no affixing of seals was necessary even if the licitation of the ship was to be carried out.

The Court accordingly dismissed the appeal with costs.

MAILLIET,—Appellant

versus

WESTERGREEN & OR,—Respondents

Before

His Honor E. J. LECLÉZIO,—Acting First Puisne Judge

L. ROUILLARD,—Of Counsel for Appellant
T. HERCHENRODER,—Attorney for the same.

R.M. BROWN, H. GALÉA } Of Counsel for Respondents
G. KŒNIG,—Attorney for the same.

Record No. 669.

21*st January* 1879

This is an appeal from a judgment of the District Judge of Seychelles of the 28th day of June 1877. The Appellant who was the Plaintiff in the Court below acting as legal guardian of his minor children heirs of the late Aristide Dupuy, had applied to the District Judge to have the seals of the Court affixed on board the Lugger *Panthère* lying in the harbour of Port Victoria, Mahé, on her tackle, apparel, furniture, gear, boats, &c., to secure the rights of the minors, the said lugger belonging for a share to the said late Aristide Dupuy. This application was granted by the Magistrate on the 12th April 1877. When the Assistant District Clerk went on board the vessel, Mr Westergreen representing his wife, objected to the affixing of the seals. 1o. Because she is proprietress of one half in the said Schooner. 2o. Because she has up to this day been the Manager of the Schooner *Panthère*. 3o. Because she has as heiress of the late Aristide Dupuy another share in the said Schooner.

The Clerk thereupon did not affix the seals and referred the parties to the Court.

The Appellant then called Westergreen and wife and the other heirs at law of A. Dupuy before the Court to show cause why the objections of Mrs Westergreen to the affixing of the seals should not be set aside, and a guardian appointed to the said lugger previous to the inventory and sale by licitation thereof and why it should not be ordered that the said vessel do remain in the harbour of Port Victoria for the greater security of those interested therein. The District Judge delivered his judgment on the 28th June in which he says :

" The Court is of opinion that by giving " an order in terms of the plaint it would be " purely and simply preventing the ship from " leaving the harbour, and the Court is of " opinion that in virtue of an act of Parlia- " ment passed in the 26th year of Her " Majesty's Reign, that such a question is " within the competency of the Court of Vice " Admiralty vizt: to arrest by an indirect " way a ship in the harbour—which power " does not lie within the District Court of " Seychelles. As to the points taken by Mr " Westergreen the Court is of opinion that " it is useless to give judgment on them as " the Court declares its incompetency to judge " the case."

The plaint had gone further than the first application made exparte, for besides the affixing of the seals for the purposes of the inventory already begun by Notary Duchenne of the property depending from the succession of A. Dupuy, the plaint asked that a guardian be appointed to the vessel previous

to the sale by licitation thereof and that the said vessel do remain in the harbour for an undetermined period. New issues were raised and as it was the clear object of the Plaintiff to stop the navigation of the *Panthère* until it be sold, the District Judge thought that he had no power to order such detention.

I am of opinion that the District Judge had no jurisdiction to grant an order such as it was prayed for in the plaint; and that even had he considered himself competent to grant an order limited simply to an affixing of seals for the purposes of an inventory he would have acted wisely in refusing it in this case. I never heard or read before that seals were affixed on a vessel for the purposes of an inventory after the decease of one of its owners, but supposing such formalities to be lawful and useful in certain cases, I fail to see the necessity under the circumstances disclosed by the Record, of having seals affixed upon the tackle, apparel, gear, &c., of that vessel which was the common property of Mrs Westergreen and the succession A. Dupuy; no allegations were made as to the improper management of the person who had been entrusted by Mrs Westergreen and the late Dupuy with the navigation of the vessel, and the parties who feared the loss of this vessel, if navigated, were free to have their shares therein insured. I find in the Dictionnaire du Notariat V. Scellés No. 23 a very good principle concerning the affixing of seals. " Il n'y a lieu d'apposer les scellés que sur " les effets dont on a à craindre la soustra- " tion. A l'égard des autres objets qu'on peut " laisser en évidence il suffit d'une description " sommaire." It would have been very easy for the Notary who had already begun the inventory of the property left by the late Aristide Dupuy, to make a summary description of the Schooner *Panthère* (half of which belonged to the said Dupuy) while lying in the harbour of Port Victoria, and no previous affixing of seals was necessary for that. But as already observed the real object of the Appellant in asking for the affixing of seals and the appointment of a guardian was the detention of the vessel in harbour till the sale by licitation thereof. This question of licitation of the vessel is not before me on appeal, so I shall abstain from giving any opinion with regard to its possibility in presence of an opposition made by a majority of co-owners; but I may at all events state that no affixing of seals was necessary even if the licitation was to be carried out.

This case had been referred to the Ministère Public for conclusions. The conclusions filed abide by the decision of the Court. Appeal dismissed with costs.

SUPREME COURT

—

APPEAL FROM JUDGMENT OF THE MASTER.—PARTNERSHIPS.—INABILITY OF MANAGERS THEREOF TO RENDER AN ACCOUNT OF THEIR MANAGEMENT.—ACTION IN DAMAGES.—RESPONSIBILITY OF MANAGERS.

Held by the Court, while affirming the Master's Report, that the defendants as managers of the firms in which the Plaintiff was a sleeping partner, were bound to give the latter an account of their management, and in their inability to do so were responsible for the sums entrusted to them, and bound to refund the same to her with interest.

The Court accordingly condemned the defendants in solido, in the first action, to pay to plaintiff as damages the sum of $ 2023.08 *with interest at* 12 *o/o from the day of the demand; and in the second action the defendant Lassime to pay the sum of* $ 4,000 *with interest at* 12 *o/o, also from the day of the demand.*

Costs against the defendants.

—

WIDOW BERTIN,—Plaintiff

versus

SAUZIER & ANOR,—Defendants

and

WIDOW BERTIN,—Plaintiff

versus

LASSIME,—Defendant

—

Before

His Honor N. G. BESTEL,—Acting Chief Judge

and

His Honor E. J. LECLÉZIO,—Acting First Puisne Judge

—

W. NEWTON,—Of Counsel for Plaintiff.
J. GUIBERT,—Attorney for the same

L. ROUILLARD,— } Of Counsel for Defendants
E. GALLET,— }

P. E. DE CHAZAL,— } Attornies for the same.
V. G. DUCRAY,— }

Record No. 18,207.

31*st January* 1879

In the words of the Master's second report

" the matter in dispute resolves itself into " the following questions—are the Defendants " as the respective Managers of the two firms " P. Lassime, Sauzier & Co. and P. Lassime " & Co. bound to give an account of their " Management to the Plaintiff ? Yes says " the Master." Have they given such accounts. " No " is the Master's answer. Are the several états de situation furnished from time to time proper accounts ? No again says the Master. And if they are unable to give such accounts, are they not responsible for the sums entrusted to them by Plaintiff, and bound to refund the same to her with interest. Yes most assuredly, concludes the Master.

These several answers to the questions put to himself by the Master were so returned by him after a twofold hearing of parties; First on his draft report, and on his Second and final report affirming his draft report.

The conclusions arrived at by the Master are therefore the more entitled to regard at the hands of the Court and deserving of being supported by the latter unless some error should have been pointed out by the argument on the exceptions filed against the several findings of the Master.

Upon the careful reading and consideration of the Master's reports, and of the evidence thereunto annexed we are satisfied with the reasons assigned by the Master in support of his several findings. On the several questions set down in his second and final report, in spite of the many criticisms passed on the several conclusions arrived at by him, and notwithstanding the many errors alleged as so many grounds for upsetting the conclusions of the Master, we are equally satisfied that full justice has been done by the Master to the parties in these suits.

We therefore accordingly affirm the draft and final report of the Master, condemn the Defendants respectively to pay to the Plaintiff as damages the sums assessed by the Master in his report (viz.) the Defendants in the first action Sauzier and Lassime *in solido* the sum of $ 2023.08 with interest at 12 per centum from the day of the demand, and the Defendant in the second action. P. Lassime the sum of $ 4000 with interest as above also from the day of the demand, with costs, with the exception however of the costs made by Mrs Bertin for the work done by the Accountant Cantenot at her request on an exparte application by her made to the Master, that the Accountant Cantenot be appointed for the purpose of making out the account demanded of the Defendants and never furnished by them. This mode of proceeding was informal. The Defendants were to furnish their accounts within a certain time, in default of which Mrs Bertin ought to have gone on with her action and claimed damages against them to the amount of the wrong sustained by her through the Defendants not having given the accounts within the time fixed by the judgment between parties.

The costs incurred by Mrs Bertin for the appointment of Cantenot must therefore be borne solely by her.

SUPREME COURT

—

APPEAL FROM JUDGMENT OF THE MASTER,—ACTION IN REDDITION OF ACCOUNTS,—PAROLE EVIDENCE,—NOVATION.

In this case the Plaintiffs as heirs of the late V. Trublet and in their own name, averred that the Defendant had the management and agency of the affairs of the late V. Trublet, from the year 1839 *to* 1858, *the date of his death, and from that date up to the* 31*st December* 1868, *the management and agency of their own affairs, and claimed from him an account supported by vouchers of his management from* 1839 *to* 1868.

The Defendant pleaded that he never was the Agent of Trublet or of the Plaintiffs, but that an account current existed between him and the late V. Trublet, which after Trublet's death, continued with his heirs ; That an account duly supported by vouchers had already been rendered to V. Trublet who had approved and signed it, and that the accounts since that period which he brought into Court, shewed a balance of $6,841.95 *in his favour.*

The parties having been referred to the Master by the Court to compute accounts since 31*st December* 1868, *the Plaintiffs objected to a great number of the items contained in the debit side of the account, on the ground that no vouchers were produced in support of those items. Thereupon the Defendant applied for leave to prove by oral evidence that the sums objected to were really paid to and on behalf of V. Trublet or the Plaintiffs. This motion was granted by the Master who, after hearing witnesses, found that a balance of* $5,948.78 *was due with interest thereon from December* 1868 *by the Plaintiffs to the Defendant.*

The Plaintiffs filed exceptions to the Master's judgment to the effect that the Master was wrong in allowing proof by witnesses of payments for which no vouchers were produced ;

That even admitting that parol evidence was rightly allowed, that evidence was insufficient to prove the payments alleged to have been made by Defendant for which vouchers were not produced ;

That the account rendered by the Defendant should include only the sums received on account of V. Trublet's succession, but should not apply to money which belonged to Mrs. Trublet personally and had no reference to the succession of V. Trublet.

And lastly that the Master was wrong in not rejecting from the account a sum of $1985.08 *being the balance due to Defendant on 31st December* 1860, *in as much as the Defendant had made a donation of that sum to Miss Emmeline Trublet, one of the Plaintiffs, and that this balance had become extinct by novation.*

Held 1o. *That the Defendant had clearly made out a " commencement de preuve par écrit " which rendered likely his allegations, and that parol evidence was accordingly properly admitted ;*

2o. *That the evidence adduced was sufficient to prove the payments made by Defendant for which vouchers were not produced ;*

3o. *That the third exception, not being properly before the Court, in as much as it was not raised by the pleadings, could not be supported ;*

4o. *And lastly that by the donation made to Miss E. Trublet by the Defendant of the balance of* $ 1985.08 *he had substituted a new creditor to the old one, and that by the systematic abandonment of the old balance in all his accounts from* 1861 *to* 1868, *the Defendant had released Mrs Trublet from payment of this debt at the time, and that therefore it could not now be revived.*

The Court being of opinion that this old debt was extinct by novation in virtue of Article 1271 *of the Civil Code, ordered this balance of* $ 1985.08 *and all interest thereon to be struck off the account, referred the case to the Master to make the necessary calculations and to report, and meanwhile reserved all questions of costs.*

—

WIDOW & HEIRS TRUBLET—Plaintiffs

versus

JULES LEVIEUX,—Defendant

Before

His Honor N. G. BESTEL, Acting Chief Judge

and

Mr LIONEL COX,—Barrister at Law.

—

E. GALLET,—Of Counsel for Plaintiffs
H. THATCHER,—Attorney for the same

L. ROUILLARD,—Of Counsel for Defendant
P. E. DE CHAZAL,—Attorney for the same

31*st January* 1879

This is an action by which Effélide Chevreau the Widow of the late Trublet acting in her personal name and as having been common in goods and property with the late Victorin Trublet. 2o. Marie Laurencine Trublet. 3o. Alfred Trublet de Nermont. 4o. Emmeline Trublet, all three acting both personally and as heirs of their late father V. Trublet aver that the Defendant Jules Levieux has had the Management and Agency of the Affairs of the late V. Trublet from the year 1839 to 19th December 1858 the date of his death, and since that date up to the 31st December 1868 the Management and Agency of the Plaintiffs' affairs, and claim from him an account supported by vouchers of his Management from 1839 to the aforesaid date of the 31st December 1868. To this action the Defendant has pleaded in substance, that he neverwas the Agent of V. Trublet or of the Plaintiffs, but that an account current existed between him and the late Trublet which after his death, continued with his heirs. That he has already rendered to V. Trublet an account supported by vouchers which was duly approved and signed by V. Trublet (the vouchers being returned to him) on 31st December 1852. That the accounts since that period which he brings into Court, show a balance in his favour of $ 6,841.95c.

By judgment delivered on 13th February 1878 this Court has ruled that the accounts up to 31st December 1852 having been duly approved and accepted by the late Victorin Trublet could not be reopened, and with regard to the accounts since that date to December 1868 the Court, on consent of the parties, has referred them to the Master for computation Pursuant to the order of the Court, parties appeared before the Master, and the Plaintiffs objected to a great number of the items contained in the debit side of the account on the ground that no vouchers were produced in support of those items, the

Defendant thereupon applied for leave to prove by oral evidence that the sums objected to were really paid to and on behalf of the late V. Trublet or the Plaintiffs. The motion was objected to by the Plaintiffs but the Master after having heard the examination " on faits et articles " of the Plaintiffs, and upon the production of several letters emanating from Widow Trublet, one of the Plaintiffs, considered that the Defendant had made a " commencement de preuve par écrit," and allowed parol evidence in virtue of Art. 1348 C. C. Witnesses were thereupon heard, and after a very careful examination of the whole case, the Master reported to this Court in favour of the Defendant to whom he finds that a balance of $ 5,948.76 is due with interest thereon from 31st December 1868.

Exceptions have been filed by the Plaintiffs against this Report and the case is now before the Court solely on these exceptions upon which, after hearing *Gallet* for the Plaintiffs and *Rouillard* for Defendant we now proceed to adjudicate.

The first exception is with regard to the admission of parol evidence. It is contended that the Master was wrong in allowing proof by witnesses of payments for which no vouchers were produced. It was not denied that the proof is competent if there can be found either in statements made by the Plaintiffs when interrogated on " faits et articles " or in the letters produced a commencement of proof by writing. This is indeed elementary in our law, the only point raised and the only point we have to decide is whether the interrogatories, or the letters, rendered likely the fact alleged by the Defendant, that certain payments for which he has no vouchers were really made by him. To determine this question it is necessary to bear in mind the position in which the Defendant stood with regard to V. Trublet and his family. Trublet and Levieux were relatives and friends, a very close intimacy and very great confidence existed between them. Trublet during the period with which we are dealing (from 1852) was and had been for some time the ownerof a small estate of about two hundred acres in extent situate in the district of Black River and called " Nermont " where he lived. The Defendant attended to all his wants in town. He supplied money for the wages of the laborers of Nermont, purchased the provisions necessary for the men and also for the household, and paid all Trublet's accounts in town such as milliners and tailor's bills, College fees for his children, the Doctor's bills &c., &c. It is admitted by the Plaintiffs that Trublet had at that time no other available funds than those in the hands of Levieux, and that all the money he required either for expenses of his Estate, or his household expenses was obtained from Levieux.

Mrs Trublet one of the Plaintiffs in her interrogatory states " It was always to Levieux that he applied when he wanted money. He took money for his personal wants or the wants of the Estate from Levieux. He had about ten laborers who remained until after his death. The men were paid from money coming from Levieux, and the revenue of the Estate." With regard to the revenue of Nermont, we are satisfied that on this score Trublet was never in a position to meet his various wants independently of calls upon Levieux. The revenue of Nermont consisted of the sale of vegetables, the produce of Trublet's gardens, and the sugar made on the Estate. The garden produce we find was not sufficient for them to live upon. As for the sugar it was sold in town and the proceeds received by Levieux who credits Trublet with them in the accounts. We observe on this point that the entries on the credit side of the account, of sums received by Levieux are not challenged. Then if any of Trublet's wants were defrayed out of the proceeds of the sugar that must still have been with money obtained from Levieux. We think therefore that we may take it as certain that independently of the money drawn from the Defendant, Trublet had not the means of meeting his household expenses, still less of paying the working expenses of Nermont. The payments which the Defendant wished and which the Master has allowed him to prove by parol evidence are with reference to the following. 1o. Sums paid for wages of laborers. 2o. Sums paid to Trublet on demand. 3o. Wine and brandy for the household. 4o. Provisions for Nermont. 5o. Guano and small accounts. 6o. Sums paid to Mrs Trublet.

First with regard to wages. The Defendant alleges that he was in the habit of supplying Trublet with the money required for the wages of the laborers and workmen employed on Nermont Estate. That when making those payments he sometimes received vouchers from Trublet (which are produced) and at other times in consequence of the confidence and intimacy existing between them he did not ask for and did not obtain receipts, and he has prayed for leave to prove by witnesses that he did make such payments from 1853 to sometime after the death of Trublet in 1858 without getting any receipt. It is admitted by the Plaintiff that there were laborers on Nermont during that period. The number of men is stated by them as having been about ten. We are in a position to form some estimation of the importance of the expendi-

ture on that head, by the sums admitted to have been received (for which vouchers signed by Trublet are produced) for part of the Year 1855. i. e. from the 18th May a series of receipts signed by Trublet for the months of May, June, July, September, October and December shewing that $ 1151 were drawn by Trublet from the Defendant for wages. The expenditure was therefore considerable, and as we have already found that Trublet had no resources except the money he received from Defendant, it is not easy to see how he met that expenditure during these periods for which the Defendant has no vouchers, as for instance in 1853 for which there is not a single voucher, and in 1854 for which there is only one voucher, unless he did, as the Defendant alleges, sometimes draw money for wages without giving any voucher. The natural inference from these facts it appears to us is that he did draw money without receipts, but we have not to find that it was so as a fact. The object of this enquiry is merely to ascertain if it is likely or not that the Defendant made the payments alleged, and we are of opinion that it is, to say the least, very likely that he did. We are confirmed in this opinion by the Statement made by Mrs Trublet in her interrogatory. She says " It is to my knowledge that after the death of Trublet, Levieux went to Nermont to pay the men, I went with him. I did not give him receipts at the time. It was not our habit, he never asked for receipts." This statement certainly renders likely the Defendant's allegations that payments were sometimes made without any voucher. There is besides the important letter from Mrs Trublet to Defendant dated 3rd May. It was properly argued for the Plaintiffs that the value of the letter must depend upon the year in which it was written, and that as the year is not mentioned it can be of no importance as evidence. But the answer made by the learned Counsel for the Defendant on this point is to our mind conclusive. We were told that the year is fixed by the fact that the letter refers to an account due by Mrs Trublet to Mautalent and which in this letter she begs the Defendant to pay for her. We have looked at this account and we find that it is approved by Mrs Trublet and paid by Levieux on 21st May 1855. We take it, therefore, as proved that the real date of the letter is 3rd May 1855. In this letter we find the following " Je viens vous demander comme notre seule branche de salut si vous ne pouvez pas nous faire un prêt de $ 200 ce mois-ci, en outre de ce que vous donnez à Victor régulièrement pour la paie de ses malabars," the Victor referred to, it is admitted is the late Victorin Trublet. We cannot look upon this otherwise than as an admission that the Defendant as he alleges did supply Trublet with money regularly for his laborers. In connection with this letter we observe that it was at one time argued before the Master that the Plaintiffs could not be bound by statements made in a letter written by Mrs Trublet, but the Master has recorded that this objection was subsequently abandoned and before us it has not been renewed. We notice that with regard to those payments alleged to have been made for wages and which are objected to by Plaintiffs the Defendant is not completely without vouchers. In many instances the Defendant produces cheques on Fouquereaux the Defendant's Banker which are acquitted by Raoul for Trublet. But it was contended by the Plaintiffs that there is no written evidence of authority by Trublet to Raoul to draw these sums and that no parol evidence can be admitted to prove such authority. The question on this point again is this. Is there a " commencement de preuve par écrit." It is admitted by the Plaintiffs that the Loïs Raoul who signed for Trublet is the Hon. Loïs Raoul, Member of the Council of Government and a nephew of Trublet. Mrs Trublet says in her deposition. " I know Raoul, he was Trublet's nephew. Raoul went very often to Nermont, he was brought up by us," and a little further on " Trublet liked Raoul very much and had confidence in him." We find besides among the vouchers produced by Defendant a receipt signed by Trublet on 4th August 1856 for $ 200 " en un mandat sur C. Fouquereaux." A cheque of same date to order of Trublet is also produced and it is acquitted by Raoul for V. Trublet. We do not say that all this is proof of a general authority to Raoul to receive money for Trublet, but we are of opinion that it is a " commencement de preuve " of such authority which renders it competent for the Defendant to prove by witnesses that Raoul was authorized to receive money for Trublet.

We now pass to payments made to Trublet on demand. We find that the amounts objected to are not for large sums, except in one instance viz. the $300 paid on 14th March 1857 as to which however the proof is complete, as we find in the evidence a receipt for the sum signed by Trublet. We have already held with regard to sums paid for wages that it is likely that large sums were paid sometimes without receipt, and we feel no difficulty upon the facts disclosed by the interrogatories in holding that it is also likely that Trublet obtained sums from the Defendant to meet his personal wants sometimes without giving any receipt.

The next item is with reference to sums paid for provisions for Nermont." We find that from 9th May 1853 to January 1860 the Defendant alleges that he purchased rice and other provisions for Nermont to the amount of $ 5924. He produces accounts shewing the purchases, duly receipted by the traders from whom the goods were obtained. Some of those accounts are made in Trublet's name, and they are not objected to, others are in the Defendant's name, and they are objected to. Thus we find that for the Years 1853, 1854 and 1855 all the charges for provisions amounting to $ 2380.50 are admitted. For the three years following all those charges amounting to $ 1848.07 are objected to and in 1859 they are admitted. The question naturally arises in those years for which the items are repudiated, how were the men of Nermont fed? That there were men cannot be doubted for not only have we the statements of Plaintiffs in their interrogatories, but we find in the accounts that sugar was made on Nermont in those years, the proceeds of which are borne to the Plaintiff's credit. It appears to us that when the admission of the Plaintiffs that provisions as a rule were supplied by Levieux is borne in mind, the only answer to the question must be that for the Years 1856, 1857 & 1858 as for the other years the Defendant did supply provisions, or at least that it is likely that he did. We find accordingly that on this point again the Defendant has made out a " commencement de preuve par écrit." With regard to the several items charged for wine and brandy and other supplies to Trublet's household and also for guano, we shall simply say that after consideration of the facts relative to that part of the case, we are satisfied that parol evidence was properly admitted.

The next class of items with regard to which parol evidence was opposed is " sums paid to Mrs Trublet on demand." On this point again we think the Master has arrived at a sound conclusion in holding that the statements made by Mrs Trublet in her interrogatory and the letters produced by the Defendant render likely the Defendant's allegations.

We must accordingly repel the first exception taken to the Master's Report.

The second exception argued for the Plaintiffs is that even admitting that parol evidence was rightly allowed, that evidence was insufficient to prove the payments alleged to have been made by Defendant for which vouchers were not produced.

On this part of the case *Gallet* first contended that the evidence was not sufficient to prove that Loïs Raoul was authorized by Trublet to sign for him, and also that the Honorable Mr Raoul himself when examined as a witness for Defendant was not able to swear that sums drawn by him were given by him to Trublet, as he said he sometimes gave them to a Clerk.

The contention that Raoul was not properly authorized is necessarily a most important one, for if we hold that Raoul had no authority, we must also hold that the payments made to Raoul are not payments to Trublet, and we must strike out of the debit side of the account the large sums which were paid to Raoul by Defendant.

We have carefully considered the deposition of the Honorable Raoul. He swears in the most positive manner that he was authorized by Trublet to act as he did. We have no hesitation in believing this statement. It is not possible to doubt it, unless one is prepared to hold that a gentleman of Mr Raoul's standing and position has not only perjured himself wilfully, but has also been guilty of a gross fraud by drawing money in another man's name without authority, and such a conclusion would be arrived at without a shadow of evidence, and Mr Raoul's deposition is besides corroborated by the admission in Mrs Trublet's interrogatory as to his position with regard to Trublet and the confidence Trublet had in him. It is further corroborated by the transaction already noticed as to the cheque of 24th August 1856 which is proved by the receipt attached to it to have been received by Trublet himself and which must have been handed by Trublet himself to Raoul and we find it is cashed and receipted by Raoul. We hold accordingly that the Defendant has proved that Raoul was Trublet's Agent with reference to those payments and that he is entitled to charge them against Trublet. The further contention that Raoul could not swear that the money was handed over to Trublet as he admitted that sometimes he " gave it to a clerk," even if well founded could not affect the conclusion we have arrived at, for if Raoul was authorized to draw these sums, it matters little in an accounting between Defendant and Trublet's heirs whether or not the money was subsequently delivered to Trublet. But we are satisfied that the contention is not well founded. It rests upon a misapprehension of what Mr Raoul really said in his deposition. The witness did not say that he entrusted the money to a clerk: he said " I may have gone, or sent a clerk to

Fouquereaux's office to cash the cheque" and further on he said "I swear that whenever I receipted cheques for Trublet I handed over the money to him"; and here again we have no hesitation in believing him.

With regard to the other charges of the Defendant's accounts not supported by receipt or cheques bearing the signature of Raoul, the evidence bearing upon each item has been carefully examined by Mr E. Ackroyd then Acting Master of this Court pending the absence of Mr Esnouf on leave, in the able and clear judgment which he delivered, in which judgment the Master concurred when he resumed office. We will only say on this part of the case, that it has received our careful attention and that we entirely concur in the conclusions arrived at. We accordingly reject the second exception of the Plaintiffs.

The third exception is that the account rendered by the Defendant should include only the sums received on account of Trublet's succession, but should not apply to money which belonged to Mrs Trublet personally, and had no reference to the succession of Victorin Trublet. For instance it was contended that a sum of $ 3300 accruing to Mrs Trublet from the succession of her mother, and also a sum of $ 1200 from the succession of Miss Sidonie Trublet should not be included in the account.

To deal with this exception, it is sufficient to refer to the Plaintiffs' declaration. The declaration states that the Defendant has managed the affairs of V. Trublet from 1839 to his death in November 1858, and that from that time the said Defendant was the Agent and Manager of the affairs of the aforesaid Plaintiffs and in such capacity has received large sums of money for the Plaintiffs' account"; and they call upon the Defendant to render his account as Agent of the late V. Trublet and Plaintiffs from 1839 up to 1868. What the Plaintiffs have asked is an account with regard to the management both of Trublet's affairs, and of their own; And such an account must include all sums which were received from the Plaintiffs or one of them, whether they accrued from the succession of V. Trublet or otherwise. We find besides that this objection is not properly before us, as it is not raised by the pleadings. In answer to the Plaintiffs' declaration the Defendant has brought his account into Court in which the sums now objected to were included. Of this the Plaintiffs had full notice. Yet the replication raises no issue as to that point. We are of opinion that this third exception cannot be supported. We have now to deal with the fourth and last exception.

The last exception is that the Master was wrong in not rejecting from the account a sum of £ 1985.08 being the balance due to Defendant on 31st December 1860, in as much as the Defendant had made a donation of that sum to Miss Emmeline Trublet, one of the Plaintiffs. The facts as regards this transaction are as follows. At the end of the year 1860 the Defendant's account shewed a balance in his favor of $ 1985.08. It appears that at the beginning of 1861, Defendant had at Mrs Trublet's request informed her of the amount of her debt towards him, offering at the same time to give her a discharge for the whole sum. In a letter from Mrs Trublet to the Defendant which bears no date, but was admitted and taken in the argument as having been written about April, she declined to accept the discharge in the following terms. "Maintenant vous me parlez de quittance, c'est hors de raison, mon ami, quand on a femme et enfants, et c'est même un cas de conscience de donner en leur défaveur; l'amitié vous aveugle &a., &a." In answer to this we find a letter (April 1861) from Defendant in which he says "Quant à la balance du dernier compte en ma faveur, j'ai une faveur à vous demander, ma chère Effélide. Vous voulez me payer de ces quelques centaines de piastres que j'aurais été si heureux de verser paternellement dans votre bourse....Et bien soit, mais permettez-moi au moins de faire avec vous cet arrangement. Je donne à ma chère petite Emmeline ce modique capital. Il lui servira lors de son mariage à acheter son trousseau, &a. Jusque là les intérêts seront par vous employés à lui donner les leçons d'un bon professeur de langue &a." We next find a document dated 3 Juin 1861 which is as follows: "Je soussignée reconnais par le présent être débitrice d'une somme capitale de $ 1828.72 valeur du 1er Janvier dernier (1861) provenant d'un don fait à ma fille Emmeline et qui à ce titre lui appartient privativement. Je m'oblige à servir sur cette somme, à compter du 1er Janvier dernier des intérêts à 9 o/o par an, lesquels seront par destination du donateur affectés d'abord aux frais d'education d'Emmeline et subséquemment à ses dépenses personnelles jusqu'à remboursement du capital. Port Louis, Ile Maurice le 3 Juin 1861."

"Approuvé V. Trublet."

It is admitted that this document is in the handwriting of the Defendant who either gave or sent it to Mrs Trublet for signature. In another letter by Mrs Trublet not dated, but which must be subsequent to the 3rd June, she alludes to this document. "Vous ai-je assez remercié de ce précieux petit papier que vous m'avez remis à signer. Oui je l'ai

signé avec des larmes de reconnaissance. Faire ainsi le bien c'est en doubler le mérite. Je n'ai pas encore initié la petite aux doux secrets, ce sera pour plus tard &a." Although the document of the 3rd June 1861 mentions the sum of $ 1838.72, it is admitted that what the Defendant intended to give to Emmeline was really the balance of the account on 31st December 1860, and this the account itself shews was $ 1985.08.

The accounts between the parties continued from 1st January 1861 up to 1868. Copies of them being from time to time given to Mrs Trublet, but the balance of $ 1985.08 was no longer borne on them.

The Plaintiffs produced a letter from Defendant dated 22nd February 1866 in which he stated that the balance then due to him was $ 322.65. It must have been very much larger, if the balance of December 1860 had not been struck off the account. It was besides admitted that the last account given by the Defendant to Mrs Trublet which was produced, shewing the balance due to him on 20th October 1867 does not include this balance of December 1860. We were told besides that the Defendant up to the time when this action was raised still intended to abandon this balance to Miss E. Trublet, but that when these proceedings were raised, he considered the parties were acting with *great ingratitude* towards him, he decided to stand on his strict legal rights, and he accordingly claimed the whole balance of 1860 together with the interest capitalized every year according to the law in matters of account current. The Master has admitted this pretention on the grounds argued before him, that the donation made to Miss Trublet was null in law, in as much as it had not been made by notarial deed and duly accepted by the donee or her guardian authorized by a Family Council as prescribed by Articles 931, 932 &c. of the Civil Code.

We think that in dealing with the question whether it is now competent for the Defendant to charge against the Plaintiffs the balance of 31st December 1860 together with capitalised interest from that date, we need not express any opinion upon the very delicate point of the validity or invalidily of the donation. The real question appears to us to be whether or not this balance is now extinct by novation under Par 3 of Article 1271 C.C. and this question upon which we have heard parties we now proceed to examine. The Art. 1271 Par 3 provides that novation takes place " lorsque par l'effet d'un nouvel engagement, un nouveau créancier est substitué à l'ancien, envers lequel le débiteur se trouve déchargé." Two conditions are therefore necessary to constitute novation under this part of the Article : 1o. A new liability in favor of a new creditor and 2o. Release of the original debt by the original creditor. On the first point we find that when Mrs Trublet signed the account of 3rd June 1861 she was indebted to Defendant in the balance of an account current. Acting upon the Defendant's desire, and by means of an instrument prepared by himself she undertook to pay another person, her daughter, a sum of money which she acknowledged was in her hands as trustee for her daughter. We think that as required by our Article there was the substitution of a new creditor " par l'effet d'un nouvel engagement." The second condition is release of the *debtor* by the original creditor—the discharge of the old debt results clearly in our mind from the fact, that in the accounts after 1st January 1861 the balance of the previous year does not appear. The state of things as we have seen continued to the last period of the transactions between Defendant and Mrs Trublet and it was only altered in consequence of the present action being entered by the Plaintiffs. We give no opinion as to whether the Defendant was morally justified in so doing by the course followed by the Plaintiffs. We have only to deal with the legal question here, and we hold that the systematic abandonment of the old balance in all the accounts from January 1861 to 1868 is sufficient evidence that Mrs Trublet had been released from payment of this debt at the time, and that it cannot be now revived. If it were otherwise, this strange result would be arrived at that Mrs Trublet would be indebted to the Defendant, in the balance of December 1860, and at the same be indebted on the Document of 3rd November 1861, to another person in a sum which is admittedly the same as the said balance. As we have said already we do not think it is necessary to decide if the donation is valid or not. We do not consider that the circumstances under which the original Creditor is induced to substitute a new Creditor in his stead are material if a new engagement is really entered into, and the old debt really discharged. There may be no " vinculum juris " between the Defendant and Miss E. Trublet, but the obligation of Mrs. Trublet cannot be thereby effected as far as novation goes. An illustration will make this clear : Suppose A is the creditor of B, with a mortgage on his property—A believes himself debtor of C. and in payment of his supposed debt tells B pay to C what you owe me—B thereupon gives a bill to C for the amount and is released of the first debt by A—Afterwards A discovers that he was not indebted to C. as he supposed.—Even if this

is judicially established what will be the remedy of A? Surely he cannot fall back upon B and enforce the original mortgage. He may sue B, but upon the bill as representing C. and will be liable to all the equities and exceptions that can be opposed to C. In the same manner we think that the transaction between the Defendant, Mrs Trublet and Miss Emmeline Trublet can be divided in two distinct parts. 1o. The donation by Levieux to Miss Emmeline Trublet contained in a letter of April 1861 in which he says: "Je donne à Emmeline" that is the assignment in consequence of which Mrs Trublet undertakes to pay to her daughter. 2o. The obligation by Mrs Trublet contained in the Act of 3rd June 1861 the assignment may be subject to cancellation for "ingratitude" or may be null in toto (Art. 932 C. C.) but the fact remains that an obligation has been entered into by Mrs Trublet.—It is possible that Miss E. Trublet is not entitled to take any thing under that obligation, and that the Defendant alone is entitled to do so. But he can take only upon the obligation. He may perhaps, if the donation be really invalid, as alleged, claim the principal still due, and the interest if it had not been spent as provided by the Act of 3rd June 1861, but he cannot revive the old debt and claim the balance of account of 31st December 1860, with interest capitalized yearly from that date to 1868.

Here we are not called upon to enforce the obligation contained in the Act of 3rd June 1861 and therefore we repeat, we have not to decide whether the donation is effective or not. What we are called to do is to give effect to the old debt, the balance of account, for which the new one has been substituted. And we are of opinion that this old debt is now extinct by novation. Vide paragraph 3 of Art. 1271 of the Civil Code.

We will therefore order this balance of $ 1985.08, and all interest thereon to be struck off the account, and we refer to the Master to make the necessary calculations, and to report to us the result. As this will be a mere matter of calculation, it will not be necessary for the Master to hear the parties, we request him to favour us with his report within three days. After the Report is filed the parties may examine it, and we shall hear them again on Thursday next but only for the purpose of pointing out errors if any there be in the Master's calculation with regard to the erasure of the balance of 30th December 1860. All questions of costs meanwhile reserved.

SUPREME COURT

—

ACTION IN DAMAGES,—SEIZURE OF A PLOT OF GROUND,—NULLITY OF LEASES,—MISJOINDER OF PLAINTIFFS,— PRELIMINARY OBJECTION.

In this case the Plaintiffs asked the Court to decree that certain leases made by one of them, St. Louis Douce, to the Defendant, be declared null and void, on account of the seizure of Douce's property by Defendant in violation of an agreement entered into between Douce and Defendant;

That a certain dation in payment or sale by Douce to some of the Plaintiffs be declared good and valid to all intents and purposes.

And they further asked that Defendant be condemned to pay £ 500 as damages, and that he should forthwith restore to them possession of Douce's property the canes planted thereon by Defendant to be forfeited.

The Defendant pleaded several pleas on the merits of the action, but in limine litis, *asked that the Plaintiffs be nonsuited on the ground that there was a misjoinder of Plaintiffs, their titles being different and the cause of action not being the same for all.*

The Court not being disposed, at this stage of the proceedings to nonsuit the Plaintiffs ordered that the issues as to the nullity of the leases between Douce and Defendant be argued first in order to avoid confusion, reserving all other questions of costs and nonsuit.

—

SOOKLAL & ORS,—Plaintiffs

versus

W. HEWETSON,—Defendant

—

Before

His Honor N. G. BESTEL,—Acting Chief Judge

and

His Honor Mr JUSTICE E. J. LECLÉZIO,—Acting First Puisne Judge.

ALPHABETICAL LIST OF CASES

FOR

THE YEAR 1879

PLAINTIFFS AND DEFENDANTS

JUDGMENTS OF THE SUPREME AND OTHER COURTS

OF

MAURITIUS

EDITED

BY ANATOLE SAUZIER, ADVOCATE

1879.

BAIL COURT

—

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE,—CHARGE OF EMBEZZLEMENT,—ARTICLE 333 OF PENAL CODE.

Held that, after a careful examination of the facts of this case and of the law bearing upon them, neither the facts alleged in the information nor those proved to the Magistrate amounted to a contract of mandat *or* dépôt, *the fraudulent violation of which would constitute the offence of embezzlement;*

That it was not necessary that the different elements which constitute the offence of embezzlement should be mentioned in the judgment of the District Magistrate, but that they must be found in the information and in the evidence;

That as these elements were not to be found in the Record of this case, the Court could not otherwise consider that the fraudulent act which the Magistrate wished to punish was not the offence of embezzlement described by Article 333 *of the Penal Code.*

The Court accordingly quashed the conviction of the District Magistrate without costs.

PAINTER,—Appellant

versus

THE QUEEN,—Respondent

—

Before

His Honor E. J. LECLÉZIO,—Acting Second Puisne Judge

—

L. A. THIBAUD,—Of Counsel for Appellant
H. THATCHER,—Attorney for the same

L. COX, Acting Substitute Procureur General
Of Counsel for Respondent
J. BOUCHET,—Attorney for the same

21*st January* 1879

This is an appeal from a conviction of a District Magistrate sentencing the Appellant to two months' imprisonment for embezzlement.

According to the information in the Record, one Jules Gautier charged one Henry Painter with having on the 18th April 1878, in the latter's house, in Port Louis, embezzled a bill or promissory note, signed by

tiff in the sum which might be so allotted to him, after deduction of all sums which should be satisfactorily established to have been received by him, on account thereof, The judgment concluded with certain instructions to the Notary for his guidance in the prosecution of the remit thereby made to him.

Mr Raoul proceeded with the work, and on the 1st June 1877 completed the operations for the rectification of the partage by Notary Maingard according to his (Mr Raoul's) then estimate and appreciation of the rights of parties respectively. The result, so far as concerns the Plaintiff Jourdain was that his interest on the Estate of his grand father was stated to be, $ 2,864.87 or Rs 5,729.75, as at the date of 1st September 1877.

The Plaintiff caused the other parties to the suit to be summoned by an Usher, to appear before the Notary on 13th August 1877, to approve of the said scheme of division or to make such objections and observations upon it, as they might think necessary. On the day named, Mr Ducray, Attorney for the Defendants appeared before the Notary, and at his request, the matter was adjourned to the 24th of the said month of August.

On that day, the parties met, before the Notary, and the minute of the meeting bears that the parties having taken cognizance of the state prepared by Mr Raoul in rectification of the partage proposed by Notary Maingard, Mr Ducray as Attorney for the Defendants Mr and Mrs Hily, under all reserve of the rights of his clients under the appeal entered to the Privy Council against the judgment above mentioned of this Court of 29th March 1877, of his right to object to the partage made by Mr Raoul, for such reasons as might occur to him, submitted certain observations to the Notary, appearing on Folios 28, 29 and 30 of the *Expédition* (certified copy) of the partage prepared by Mr Raoul lodged in the case, and now before us.

The Plaintiff assisted by his Attorney Mr Elie protesting against the observations of Mr Ducray, submitted objections to the work of Mr Raoul amounting altogether to 12 in number, set forth on Folios 30 and 31 of said *Expédition*.

In this position of matters, Mr Raoul referred the parties to the Court, stating that he had made up his scheme in strict conformity with the judgment of the Court, but that it appeared to him, after weighing the observations of the parties, that some of them were deserving of consideration. Accordingly, he thought that Mr Ducray's observation as to a sum of $ 674.11, the value of certain casks of wine might be admitted, as the attention of the Court, probably had not been called to certain evidence bearing on the matter. He further stated his opinion that certain of the Plaintiff's objections might also be admitted as mentioned on Folios 32 and 33 of the *Expédition*—with the view, therefore, as the Notary explains, of avoiding the loss of much time, and of assisting the Court, if it should consider his views as well founded, he has made by anticipation, such modifications on his Report, as those changes would render necessary.

The result of those alterations on his scheme of partition, would be to increase the sum falling to the Plaintiff as his share, from $ 2,864.87½ or Rs 5,629.75 as above mentioned, to $ 7039.18 or Rs 14,078.36—as at the date of 1st September 1877.

When the case came up before us for argument on the proceedings and conclusions of Mr Notary Raoul, it was admitted by the Counsel on both sides, that, although the decision of the Court of 29th March 1877, bore that for the amount to be found due by the Notary under deduction of payments to account duly vouched, the Court then found the Defendants liable to the Plaintiff. Nevertheless both parties might still be competently heard upon the operations of Mr Raoul, with the view of supporting the interests of their respective clients.

The Counsel for the Defendants strenuously objected to the later proceedings of the Notary, after he had made what Counsel termed his first Report, bearing the date, as we have seen, of 1st June 1877. He argued that although the Notary himself states that his first Report was in strict conformity with the judgment of the Court, he nevertheless, afterwards, proceeded to review his own judgment, which it was contended he could not competently do: It was farther argued that the Defendants could only be asked to consider the first Report, now final in the sense that the later work of the Notary could not be looked at, and which first report as a whole, they were willing to accept as fixing the position of parties: That the Notary had attempted to go beyond his functions, had in fact acted in contradiction of the Court, on his own assumption that on some points the Court had been imperfectly informed, Counsel therefore opposed the reception and recognition of the additional report by Mr Raoul both in principle and details. All those argu-

ments of the Defendant's Counsel were contested by the other side.

It does not appear to us that we can sustain the objections here made on behalf of the Defendants for the purpose of shutting the later work of Mr Raoul altogether out of view.

After his Report of 1st June 1877 had been seen by the parties, they came before him, and submitted, on both sides, certain objections to the manner in which he had framed it. It appeared to him that those objections deserved consideration, and with the view of saving time, and a fresh remit from the Court, he remodelled his Report, so far as he thought the points submitted by the parties were well founded, and ultimately laid the whole result of his enquiries before the Court. In all this we do not see that there was anything incompetent or irregular, so as to prevent us taking up the case as it stands with the assistance afforded by the observations of the Notary. In preparing the present judgment, what is called the second Report of the Notary has been used by us mainly as a guide to various points which had not been dealt with in his first Scheme of division. The parties by their Counsel have now been fully heard upon those points, and on every matter which they considered material. We shall now proceed to state our views upon the questions argued before us, in their order.

The first point discussed related to certain articles of silver plate belonging to the late Mr Hérout and forming part of his succession ; The Plaintiff stated that those articles had not been submitted to the experts for valuation, in this case, along with the other pieces.

The Plaintiff however, at the last hearing of the case, did not press this matter, and the conclusion of the Notary as to the silver plate will stand, as it is.

2. The Plaintiff claimed interest upon the sum of $ 674.11 the value of certain casks of wine for which it was not disputed that the community had to account. The Defendants maintained that the Court in the judgment of the 29th March 1877—while alluding to this matter, had not allowed interest ; that this must now be presumed to have been done by the Court advisedly and consequently it was now too late to give interest, the matter being finally closed. We are unable to see any good reason why interest should not be allowed on this as on the funds generally of which Mr and Mrs Hily took possession. The omission by the Court in its judgment of 29th March 1877—to give interest was probably altogether accidental from this incidental matter of interest not having been brought at the time, under its notice. We do not think that the omission can be pleaded now to the exclusion of the claim of interest.

3. The Plaintiff contended that, in making up the accounts among the parties interest ought to run upon each sum of money, from the date of its being received by Mrs Hérout. To this the Defendants objected that in his first Scheme, the Notary did not allow interest : That by the judgment of the Court he had no authority to do so, but on the contrary by that judgment he was foreclosed from allowing interest : That by Art. 1153 of the Civil Code interest was only to be given when the law expressly allowed it, or at all events, only from the date of the demand. We do not think that the Defendant's reasoning here ought to be given effect to. From the whole tenor of the judgment of the Court, we are satisfied that it was the intention of the Judges to allow interest to the Plaintiff on the money in the hands of his opponents, only from the date of receipt, it was necessarily enjoyed by them ever since, and looking at the position in which they stood with respect to the Plaintiff, and their conduct generally as now disclosed by the evidence in the case, we have no hesitation in allowing the interest here asked for C. C. 1373, 1992 S. 1854, 1-635.

4, 5, & 6. We think interest should be allowed on those items of the account for the same general reasons as in the last objection.

7. The question raised under this objection by the Plaintiff which the Notary in his later suggestions to the Court has dealt with, in a way favorable to the Plaintiff, is one of importance. The Plaintiff takes his stand here upon Art. 792 of the Civil Code which runs as follows : " Les héritiers qui auraient diverti ou recélé les effets d'une succession, sont déchus de la faculté d'y renoncer, ils demeurent héritiers purs et simples nonobstant leur renonciation, sans pouvoir prétendre à aucune part dans les objets divertis ou recélés." The Defendants contended that it is now too late to raise this question as the judgment of 29th March 1877 was altogether silent on the matter, and that they were not bound now to enter upon and argue the question ; at all events, they submitted that such a law being of a highly penal nature, ought to be most strictly interpreted and looking at what had really taken place in this case, at all the facts and circumstances, they contended that this text of the Code did not apply

here : There was no *recel* or *divertissement* by the Defendants which the law absolutely requires, S. 1856 1 425. *Demolhombe* and *Marcade* in their commentaries on the article. the Defendants further argued that they are not liable for the way in which the former Notary Maingard dealt with the succession. The items referred to arise from nothing else than mere errors in the way in which the interests have been calculated, in framing the accounts, between the parties. We do not think that we are foreclosed from considering this question by reason of anything that has taken place in the case, but we quite agree with the Defendants in their argument that the law which is here invoked by the plaintiff, being of a highly penal nature, ought to be strictly interpreted and should not be stretched by implication beyond its precise terms; We think that the forfeiture contained in it, should not be enforced, except the conduct of the inculpated parties has been such as to bring them clearly within its scope. We must accordingly refer to the judgment of this Court of 29th March 1877 for the solution of this question. From that judgment it appears that the conduct of the Defendants in not giving up a large part of the succession for the benefit of the heirs entitled to share in it, but setting it aside for their own personal advantage, was clearly fraudulent. This has been expressly found in the said judgment of the Court. We are therefore unable to see any grounds for the non application of Article 792 of the Code to this case now before us. We do not think as we have already stated, that we are precluded from considering this question and that the contention of the Plaintiff here can be shut out on the ground that it is too late, and that it ought, under pain of foreclosure for ever, to have been submitted before the Court pronounced the leading judgment of 29th March 1877.

Looking at the peculiar facts of the case and the course it has run before this Court and the Notary, we think the point, though we doubt it might have been raised earlier before the remit to the Notary, was still in time, and competently taken before the Notary and before ourselves, when the case was last argued before us. The Report of the Notary is therefore affirmed on this part of the case.

8, & 9. These objections relate to the expense of the partage by Notary Maingard and the costs due to Mr Raoul for his professional work. We see no reason to interfere here with the conclusions at which Mr Raoul has arrived in his later Scheme of division.

10, 11 & 12. We also think that as to the matters embraced under those heads Mr Notary Raoul has arrived at a sound conclusion and that on those points, also, it is our duty to give effect to the views contained in his later Scheme of division.

On the whole matter, therefore, we give judgment against the Defendants Mr and Mrs Hily, jointly and severally, in favor of the Plaintiff for the sum of $ 7,039.18 or Rs 14,078.36 as brought out in the Report of the Notary, with costs.

SUPREME COURT

—

TRUBLET & ors,—Plaintiffs

versus

LEVIEUX,—Defendant

—

Before

His Honor N. G. Bestel, Acting Chief Judge

and

Mr Lionel Cox,—Provisional Judge.

Record No. 19,663.

6th February 1879

After reading the Master's Report, the parties admitting the correctness of the balance found by the Master to be due by Widow and Heirs Trublet to Levieux and upon hearing Counsel on both sides on the question of costs, it is ordered that the Master's Report be and the same is hereby affirmed, and that the said Defendant do recover against the said Plaintiffs the sum of one thousand nine hundred and ninety three dollars and forty two cents or three thousand nine hundred and eighty six Rupees and eighty four cents being the final balance found by the Master, value of the 31st day of December 1868, with the sum of three thousand six hundred and twenty five Rupees and two cents for interest thereon at the rate of nine per centum per annum up to the said sixth day of February together with the sum of four thousand and four Rupees and twenty five cents for costs.

SUPREME COURT

—

ARREST AFTER UNSATISFIED JUDGMENT,—PRISONER,—CERTIORARI,—MOTION TO BE ADMITTED TO BAIL.

Where a certiorari has issued to bring up a judgment under which a party is in prison, the Court will not admit him to bail until the case is determined by the Court, before a return has been filed to the writ of certiorari, as until such return is filed, the Court is not in presence of the process upon which the party is detained.

In this case the Court stated that as soon as the return to the writ would be filed, the motion for bailing out the Applicant would be entertained.

—

IN THE MATTER OF

ALEXANDRE RIBET,—Petitioner

—

Before

His Honor A. G. ELLIS,—Acting First Puisne Judge

and

His Honor E. J. LECLEZIO,—Acting Second Puisne Judge

—

T. L. JENKINS,—Of Counsel for *Petitioner*

Record No. 20,210

5th March 1879

Jenkins, for the Petitioner in this case, after having obtained from the Court the issuing of a writ of certiorari to remove into this Court a certain record of a judgment of the Senior District Magistrate of Port Louis dated the 18th February last, in a certain matter which was a Summons after unsatisfied judgment issued at the request of one Louis Laurent, moved the Court yesterday for a rule ordering the release from prison of the said Petitioner, who, before the motion for the issuing of the said writ of certiorari was made, had been apprehended on a writ delivered by the District Clerk of Port Louis in virtue of the said judgment, "and this on the said Plaintiff "furnishing bail to be at the disposal of the "Court, and surrender himself when required "and also until the Supreme Court shall "have decided upon the motion for the writ "of certiorari aforesaid."

After having taken time to consider, we are of opinion that it would be inexpedient and premature for the Court to deal with the motion for the release on bail of the Petitioner before a return has been filed to the writ of certiorari already ordered to be issued, as until such return is filed the Court is not in presence of the process upon which the Petitioner is detained. This appears to be the course followed by the Court of Queen's Bench in analogous circumstances. In *King versus Reader*, a short report of which is to be found in *Queen versus Lord* L. J. 1847, Duties of Magistrates page 15.) the Defendant after he had lain a fortnight in gail brought a certiorari, and upon the return of it he was admitted to bail. That case was acted upon in *re Turner* 15 L. J. N. S., M. C. 140, altho' it appears that there the bailing was by consent.

In *Queen versus Lord*—a Rule absolute had, on a former day, been obtained for a certiorari by virtue of which Lord was committed to prison. A motion was afterwards made that the prisoner might be brought up to be admitted to bail until the argument of the certiorari, and on this motion the Court admitted the prisoner to bail. See also the authorities quoted in Note E page 429 of *Paley on Summary Convictions 5th Edition* 1866.

On the strength of these authorities we are disposed to entertain the motion for bailing out the applicant as soon as the return to the writ of certiorari has been filed, and we understand that this return will be made immediately after the service of the writ upon the Magistrate.

SUPREME COURT

—

MOTION FOR LEAVE TO APPEAL TO PRIVY COUNCIL,—INVALIDITY OF PETITION ON THE GROUND OF CHANGE OF ATTORNIES,—PROVISIONAL EXECUTION OF JUDGMENT.

Held that the judgment pronounced on the 6th February 1879 *was the final and definitive judgment of the Court on the issues raised between the parties in this case, and that those issues involved sums exceeding the appealable amount ;*

That the petition for leave to appeal was not invalid because the proceedings connected with it had been taken by an Attorney other than the Attorney duly entrusted with the previous proceedings in the action, in as much as the mandate committed to the original Attorney was exhausted when the final judgment was obtained, and it was competent for the party to entrust the proceedings in connection with the appeal to another Attorney without any judicial order sanctioning a change of Attornies.

That the Defendant was entitled to the provisional execution, pending the appeal, of the judgment given in his favour, on his furnishing sufficient security for the due performance of such judgment as the Privy Council should think fit to give on the appeal

The Court accordingly granted the motion for leave to appeal made by the Plaintiff and the provisional execution craved by the Defendant, and referred the parties to the Master to determine the security to be given on either side—No costs.

—

WIDOW TRUBLET & ors,—Plaintiffs

versus

LEVIEUX,—Defendant

—

Before

His Honor Mr Justice Bestel,—Acting Chief Judge

and

His Honor A. G. Ellis,—Acting First Puisne Judge.

—

E. Pellereau,—Of Counsel for Plaintiffs
E. Leblanc,—Attorney for the same

L. Rouillard,—Of Counsel for Defendant
P. E. de Chazal,—Attorney for the same

Record No. 19,663.

6th March 1879

In this case the Plaintiffs moved for leave to appeal to Her Majesty in Her Privy Council.

The claim of the Plaintiffs in the action naturally sub-divided itself into, and was disposed of by the Court under two branches. The questions arising under the first branch of the cause were dealt with and disposed of by the Court in a judgment dated 14th June 1878. It is not denied that this judgment was for an appealable amount, and leave to appeal was applied for by the Plaintiffs, and, in accordance with the practice of the Court the petition was sisted until judgment should have been pronounced disposing of the second branch of the action.

The questions involved in the second branch of the action were disposed of by two judgments of the Court, the first dated 31st January and the second 6th February 1879 A second petition for leave to appeal against the latter judgment was presented by the Plaintiffs. In connection with this petition, Defendant contended, in the first place that, the judgment by which the second branch of the action was finally and definitively settled was that under date 31st January 1879 and not that of 6th February, to which alone the petition for leave to appeal is applicable. We have carefully considered this contention and are of opinion that it is not well-founded. We consider that while the judgment of 31st January enunciated the principles to be given effect to in disposing of the second branch of the action, it is merely preparatory to and not the final and definitive decree of the Court upon this part of the case. Prior to the final and definitive judgment being pronounced it was necessary that certain calculations and computations should be made, and with this view the judgment of 31st January concluded by referring the case to the Master, and the necessary calculations and computations having been made by him, the Court on the 6th February proceeded to pronounce its final and definitive sentence, and by the judgment of that date disposed of the questions raised under this branch of the case. It was not disputed by the Defendant that the issues under the second branch of the case involved sums exceeding the appealable amount, and regarding, as we do, the judgment of 6th February 1879 as the decree by which those questions were finally disposed of, it follows that the Plaintiffs are entitled to appeal from that judgment.

It was further objected by the Defendant that the petition was invalid, because the proceedings in connection with it had been taken by an Attorney other than the Attorney duly entrusted with the previous proceedings in the action. We are however of opinion that this objection cannot be sustained, as we are satisfied that the mandate committed to the original Attorney was exhausted when the final judgment of this Court on the issues raised in the declaration was obtained, and that it was competent for the party to entrust the proceedings in connection with the appeal to another Attorney without any judicial order sanctioning a change of Attornies.

We accordingly grant the Plaintiff's applications for leave to appeal to the Privy Council against the judgments of this Court of 14th June 1878 and 6th February 1879.

With regard to the question of provisional execution, the Plaintiffs contended that the Court in exercise of its discretion under the Royal Order in Council should refuse such execution in this case, on the ground that the judgment pronounced was *ultra petita*. On such an application as this, however, we cannot discuss the competency of the judgment pronounced by the Court, and—as we deem this peculiarly a case in which the Defendant is intitled to the execution, pending the appeal, of the judgment directing the Plaintiffs to pay to him the amount found due and the whole costs of the action, we direct that the judgment be carried into execution, but that before such execution, the Defendant do enter into good and sufficient security for the due performance of such judgment or order as Her Majesty, her heirs and successors shall think fit to make upon the appeal.

We further refer the parties to the Master to hear and determine all questions relative to security to be furnished on either side. No costs.

SUPREME COURT

—

APPEAL FROM JUDGMENT OF THE MASTER,—ACTION IN REDDITION OF ACCOUNTS.

Held by the Court that, after carefully considering the evidence both documentary and parole which had been adduced in the case, the judicial proceedings which had taken place in this Court, the conduct and actings of the different parties from first to last, their legal position and relations to each other so far as shewn by the evidence, the Master had arrived at a sound conclusion in his Report, which was affirmed in all respects excepting as to the value of 16,000 *gallons of rum the price of which was reduced from* $ 1.50 *to* $ 0.50 *per gallon. The Court granted to the Plaintiff two thirds of their costs as taxed by the Master.*

—

BOULANGER & WIFE & ANOR, Plaintiffs*

versus

HEIRS DANIEL MARTIN & ORS,—Defendants

Before

His Honor Sir C. F. SHAND, Kt., Chief Judge

and

His Honor Mr JUSTICE BESTEL, First Puisne Judge

—

L. ROUILLARD,—Of Counsel for Plaintiffs
G. A. RITTER,—Attorney for the same

W. NEWTON,— } Of Counsel for Defendants
G. GUIBERT,— }
J. GUIBERT,—Attorney for the same

12th September 1878

In this case the Plaintiffs Marie Mélanie Célina Geffroy the legitimate and duty authorized wife of, but separated as to property from Aristide Boulanger.

2o. Aristide Boulanger for the validity of the proceedings and the authorization of his wife, both of the District of Plaines Wilhems, proprietors.

3o. Emma Fenouillot de Falbaire, the widow by a first mariage of Emile Geffroy and by a second mariage of Paul Bussié also of the District of Plaines Wilhems proprietress, sued the Defendants.

1o. Marie Juliana Martin the duly authorized wife of Edouard Wilman.

2o. The said Edouard Wilman for the validity of the proceedings and the authorization of his said wife, both of this town of Port Louis proprietors.

3o. Arthur Martin of the District of Flacq, landowner, and certain other persons all called in their capacity of heirs, under benefit of inventory for their share and portion in the succession of the late Daniel Martin their father deceased.

4o. Célina Lemerle the Widow of Daniel Martin of the District of Pamplemousses, landowner, acting in her own name on account of the community of goods and properties which existed between her and her late husband, which community she has accepted, under benefit of inventory.

5o. Richard Ambroise Robert of Port Louis without profession, since deceased.

* "This case was passed over by mistake in 1878."

6o. Alfred Rochecouste of the District of Grand Port, landed proprietor.

7o. Edward Hart of Port Louis, sworn-broker and landed proprietor since deceased.

8o. Lisis Cantin of Port Louis, landed proprietor :—All the above named Defendants as having been parties to a suit pending some years ago before the Court between Robert and Martin and bearing the No. 10027.

The Plaintiffs alleged that the said Widow Bussié and Boulanger the wife, had, on 2nd October 1862, obtained from the Court a judgment condemning the concern known by the name of *Distillerie Centrale* to pay the sum of $ 12,439.70 together with interest :

That by declaration issued on the 27th of August 1863, Richard Ambroise Robert in his capacity of Manager and partner of the *Distillerie Centrale* prayed the Supreme Court to order that accounts be furnished by the late Daniel Martin who had made advances to the said *Distillerie Centrale*, and received in consignment the produce thereof, and in default of such accounts, within the delay to be fixed by the Court, that Martin should be condemned to pay the sum of $ 15,000 the presumed balance of the said account :

That on such declaration issue was joined, and by Rule of Court of the 20th November 1863, the matter at issue was referred to the arbitration of Henri Rostand of Creoles street, Port Louis, Accountant to a Broker, and of François Gouillard of Port Louis, Accountant, and of such third person as they would appoint in case of division between them :—

That in consequence of the arbitrators not agreeing, and their having come to an opposite conclusion, Jules Chauvin then of Port Louis Merchant, was appointed umpire, by Rule of Court of the 11th of May 1864 :—

That on the 14th of March 1865, Jules Chauvin gave his award in favor of Daniel Martin, finding among other things, that a balance of $ 19,040.94 at the date of the 31st December 1863 was due by the *Distillerie Centrale* to Daniel Martin to wit 13,163 dollars and 46 cents balance of first account beginning 22nd December 1856 and ending 31st December 1863, and the second beginning on the 10th January 1862 and ending 31st December 1863, errors and omissions excepted : That on the 12th December 1865 the said award of Jules Chauvin was made a Rule of Court : That an examination of the said accounts has shown Plaintiffs that on the debit side the said accounts were teeming with errors, false, fraudulent and double entries all as minutely detailed in the declaration : That the said entries are false and fraudulent because 1o. No judgment was ever obtained by Brown against the *Distillerie Centrale*. 2o. Because according to a deed under private signatures between Brown and Robert dated 4th and 5th February 1861 duly registered, which document came to light in the latter end of the Year 1870, in the course of a law suit between Martin and Brown, and ignored by all, save the parties thereto, no such payments as those mentioned in Martin's account could have been, or were made as alleged :

That all the aforesaid items which cannot be maintained on the debit side of the aforesaid accounts amount to the sum of $ 26,424 and 51 cents :—

That further more important omissions. and false entries were also to be found on the credit side of the aforesaid account which were also minutely set forth in the declaration.

The declaration concluded that the Plaintiffs Widow Bussié and Boulanger the wife exercising the rights of their debtor, the *Distillerie Centrale*, were entitled to call upon the Court to order that the aforesaid accounts the balance whereof has been found by Mr Jules Chauvin to amount to the aggregate sum of $ 19,040.94 errors and omissions excepted, be rectified by striking out from the debit thereof, at their respective dates, the sundry entries which they averred to be erreneous entries, double entries, and fraudulent, amounting to $ 26,424.51 and by adding to their credit side the sundry amounts, which have been omitted in the said accounts and which ought to have figured therein, and amounting to the sum of $ 51,352.97 and further ordering that the Master, upon the aforesaid rectifications, should establish the true balance of the accounts and the Defendants the heirs of the said Daniel Martin should pay the aforesaid balance with interest, and give up possession of the said *Distillerie Centrale*, with costs : reservation of the rights of Plaintiffs to examine the further accounts of the said Daniel Martin and to claim damages for all the acts, deeds, &c., of the said late Daniel Martin, especially for the state of bad repairs and conditions in which the machinery, buildings, &c, of the said *Distillerie Centrale*, had been allowed to fall into.

The Defendant Martin *pleaded* that the Plaintiffs action is informal and inadmissible in law ; 1o. Because the object of the said action is to change and set aside a final

award of arbitrators made a rule of Court after argument on the 20th of November 1863, in a suit then pending before the Supreme Court between Richard Ambroise Robert Acting in his alleged capacity of Manager of the *Guildiverie Centrale*, against Daniel Martin and Alfred Rochecouste, Lisis Cantin, Paul Mollières and Edward Hart, intervening parties, in their capacities of Members of the Committee of Supervision or Control of the *Distillerie Centrale* of Mahebourg; 2o. Because the arbitrators have in conformity with the powers conferred upon them finally settled the accounts between the late Daniel Martin and the said *Guildiverie Centrale* of Mahebourg; The Defendants farther denied the several facts and things alleged in the declaration and especially the alleged errors, and double or false entries:

The Defendants prayed that the action be dismissed with costs; The Defendants Edward Hart and Lisis Cantin, pleaded, that they abided by the decision of the Court, claiming their costs against the failing party or parties. The Defendant A. de Rochecouste, pleaded. 1o. That he has nothing to say in bar of Plaintiff's demand as to the rectifications of accounts prayed for by Plaintiffs against the *Guildiverie Centrale* and abided by the decision of the Court. 2o. The said Defendant further said that the Court in its judgment of 7th October 1872, acknowledged his right to the portion of land on which the said Distillery has been erected, and has further acknowledged that the said Defendant was not personally liable towards Plaintiffs or any other party for the debts of the said *Guildiverie Centrale*, both of which points have been decided already by the award of arbritration given by Jules Chauvin and have not been questioned by Plaintiffs. 3o. The said Defendant further pleaded that the rights of Plaintiffs, whatever they may be, can only be exercised against the distilling apparatus alone of the *Guildiverie Centrale*, and not against the land and the buildings, which are the personal property of the Defendant.

The Plaintiffs in answer to the first plea of the Widow and heirs Daniel Martin, said that their action is formal, competent and admissible in law. And as for the second plea, they joined issue.

The Defendant Richard Ambroise Robert in answer to the Plaintiff's declaration said: That he joins the Plaintiffs in claiming costs against the contesting party or parties.

On 11th of February 1874, the Court, pronounced this order "After hearing Counsel, on both sides, and after mature deliberation, it is ordered that the parties be referred to the Master to compute the accounts, as prayed for. Costs reserved."

The questions which the Court has now to decide are those arising on the Report of the Master, to whom as we have just seen, a remit was made by the Court to compute accounts. On the 4th November 1874 the Master furnished a very full and elaborate Draft Report containing a miuute history of the case and the relations of parties consequent upon the association of a certain number of persons dated 5th September 1855. This copartnery under the name of the *Guildiverie Centrale* was established for the production of rum from the sirups and molasses which the Members of the Company who were planters, could not turn to a better account, and were to hand over to the late R. A. Robert who was to Manage the concern, and account for the results. The partners were not to incur any personal liability, and the *materiel* of the distillery (the ground excepted) was to be the sole guarantee or security to those who might come forward with money, for the promotion of the business. Daniel Martin, the predecessor of the Defendants advanced funds to Robert for the business, and in return, had consigned to him the rum manufactured during the Years 1858, 1859, 1862 and 1863. In August 1863, Robert entered an action of accounts against Martin, in which certain of the partners intervened in their capacity of Members of the Supervising Committee of the Distillery. The result of the suit which was referred to arbitration was, that two sums of £ 13,163.46 and another of $ 5,877.48 were found due to Daniel Martin by the Distillery. The award was made a Rule of Court on 12th December 1865.

The present Plaintiffs are creditors of the distillery, holding a judgment of the Supreme Court for the sum of £ 12,439.70, dated 2nd October 1862, and they have entered the present suit, with the view of correcting the above mentioned accounts to which, as we have seen above, they have stated various very serious objections. The Master has dealt with the whole of those in his Draft Report, and, after hearing parties upon objections to the same, he prepared his final Report dated 1st April 1875. On this final Report, parties have been heard at length before us, and we have also had the advantage of a written pleading from both sides of the bar, which, on the suggestion of Counsel themselves, we allowed them to put in.

In now reviewing the Master's Report, we shall deal with the various matters raised in it, in their order.

I. *Objections of the Plaintiffs.* We think the Master in this part of the case, has carried out the remit from the Court properly, and we therefore approve of what he says under this head of his Report. To finish the case, the two points here referred to will require to be disposed of by the Court, if, the parties cannot agree about them.

II. *Objections of the Defendants.* No. I. The objection here relates to two entries of $ 616 and $ 438.21 as *moyennes d'intérêts.* The Master has amended his draft and maintained those entries in the account, and in so doing we think he has acted correctly, and we approve of the conclusion at which he has arrived.

The 2nd, 3rd and 4th objection. It was contended by the Defendants, that they should have been allowed credit for all the money paid under the judgments in the cases of *Brown versus Martin,* as in law the *Guildiverie Centrale* was bound by those judgments, that at all events, if their predecessor Martin was not entitled to take credit for the whole amount of those judgments, he ought, in any view, to be credited with all that he actually paid to Brown, under the compromise which they entered into. That though the judgments in those cases were given against Martin and Robert personally, they really related to the business of the distillery, as Martin had authority, while it was in his hands, to issue *bons à livrer* : that even if Martin was not warranted in issuing those *bons à livrer* by the Committee of Management of the *Guildiverie Centrale,* he was authorized by Robert to do so, to the extent of the quantity of the rum manufactured, which fell to his share, and he, Martin, ought to get credit at least for that proportion, which would vary according to the amount of interest Robert might be held to have in the compromise between Martin and Brown.

On those different questions, after carefully considering the evidence both documentary and parole which has been adduced in the case, the judicial proceedings which took place in this Court, the conduct and actings of the different parties concerned from first to last, their legal position and relations to each other, so far as shewn by the evidence and having given the arguments of Counsel both oral and in writing, our best attention, we are of opinion on the whole questions here involved that the Master has arrived at a sound conclusion in his Report, and we accordingly confirm the same in this part of the case.

Fifth objection. This relates to the 16,000 gallons of rum stated to have been delivered to Brown by Martin, in the month of September 1862, but which was not in point of fact delivered. The Master has held here that this rum ought to be charged against Martin at the rate of $ 1.50—as the market rate at the time, there being an accord then existing in the trade. We are not able to concur in this conclusion. Without at all approving of the conduct of Martin here, or sustaining the alleged excuse made for him that he was driven to unworthy modes of protecting himself by the conduct of the Managers of the *Guildiverie Centrale* we think that the Plaintiffs must submit to the ordinary rule of being obliged to prove their case, in a fair and reasonable sense, according to the circumstances actually occurring. What became of this rum is not satisfactorily established although under the orders of this Court very extensive inquiries have been instituted for this purpose, but keeping in view the great lapse of time since those affairs took place, the death of many of the parties, the loss of business books, and the circumstances generally, which are both peculiar and not a little complicated we think it would not be reasonable to charge the value of the rum at this very high figure. The Plaintiffs themselves have latterly stated that they were prepared to admit that the finding of the Master here might with propriety and reason be largely modified. In the absence of positive proof in the matter, we must adopt such a scale as may in our opinion most fairly and equitably meet the justice of the case. We think on the whole, that a rate of 2s. per gallon will be fair and reasonable here, and we alter the Master's Report to this extent accordingly.

Sixth objection. This head has reference to an argument of the Defendants that the Master has in making up his Report given a weight and effect to certain documents to which they are not legally entitled. It appears to us that the objection cannot be supported for it must be remembered that it is only after parole evidence had also been led at length when he had of course the advantage of seeing the witnesses that the Master reviewing the whole case as disclosed on both sides has arrived at the conclusions which he has adopted. It has been argued for the Defendants that the Report of the Master finding sums so large in amount due by them, must be erroneous, as no such profits could possibly have been realized to support the results at which he has arrived. But looking at the startling fluctuation in the price of rum chiefly caused by coalitions from time to time among the distillers and the encouragement to speculation thereby engendered, it was only to be expected that large gains and losses would from time to

time be realized and sustained by persons engaged in that traffic.

The result of the present judgment of the Court is to maintain the final Report of the Master, in all respects excepting as to the value of the 16,000 gallons of rum above referred to which is reduced from $ 1.50 to $ 0.50 or 2s. per gallon ! If the parties cannot make the necessary alteration for themselves, we remit the case to the Master to change his Report to the extent just mentioned, and recast it accordingly. As this is substantially a final judgment in the case, we find the Plaintiffs entitled to two third of their costs, as they shall be taxed by the Master.

BAIL COURT

—

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE,—CHARGE OF EMBEZZLEMENT—DISMISSAL OF APPEAL,—ARTICLE 333 OF PENAL CODE.

Held, in this case, that the fact of the existence of a mandate that the Appellant should lay out the money delivered to him in taking out a license for the cultivation of tobacco brought the case within the terms of Art. 333 of the Penal Code.

The Court accordingly maintained the conviction of the District Magistrate and dismissed the appeal with costs.

—

LUTTY,—Appellant

versus

THE QUEEN,—Respondent

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Before

His Honor N. G. BESTEL,—Acting Chief Judge

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EUG. BAZIRE,—Of Counsel for Appellant
G. BOULOUX,—Attorney for the same

L. COX,—Of Counsel for Respondent
J. BOUCHET,—Attorney for the same

Record No. 455.

6th March 1879

The facts of the case now under appeal as stated by the District Magistrate of Rivière du Rempart are the following (viz.) The accused Lutty (now Appellant) was charged below by one Baya Purredi Appadoo with having received from the latter about eight months ago a certain sum of money to wit : Twenty Rupees to procure for him the said Appadoo a license to plant tobacco, and three Rupees for his Lutty's travelling expenses—Lutty instead of fulfilling his promise, appropriated to his own use the money so entrusted to him for the purpose aforesaid, and did not obtain the license which he had agreed to take out. Appadoo under the belief that Lutty had taken out the licence had planted his land with tobacco. Unable to produce his licence for the cultivation of tobacco when called upon to exhibit the same the said Appadoo was prosecuted by the Island Revenue Inspector for having so cultivated tobacco without such license and was convicted of the said offence and condemned to £ 4 fine and costs. The said Appadoo sought redress from the District Court of Rivière du Rempart for the prejudice caused him by the now Appellant. After hearing the evidence tendered in the Court below, the Magistrate arrived at the conclusion that the charge was fully proved and accordingly convicted Lutty the now Appellant to three months imprisonment and to pay a fine of Rs 100 and costs under Art. 333 of the Penal Code of the Island.

Lutty professing to be aggrieved by the convictien has appealed from that conviction. Numerous are the grounds of Appeal ; but the learned Counsel abandoned all those several grounds and confined his argument to the subject matter of the 7th ground of appeal only and which sets out that " even taking the fact deponed to by complainant (Appadoo) below and his witnessses as proved, yet they did not and cannot amount to the charge of embezzlement but at most to that of swindling." In support of the view taken by the learned Counsel of Art. 333 of the Colonial Penal Code, *Bazire* quoted the judgment delivered by Leclézio Judge, with the concurrence of his brother Judges on the 21st January 1879 viz : Painter v. The Queen. There is not the slightest analogy however between the two cases. In the case of Painter the bill acquitted by Gautier and handed over to Painter was found not to have been (remis) or so entrusted in persuance of any hiring or mandate and the keeping possession of the bill by Painter did not amount to an embezzlement within the terms and meaning of Art. 333 of our Penal Code. The learned Judge was under the necessity of quashing the conviction with costs in these words " I cannot do otherwise " than consider that the fraudulent act which " the Magistrate wished to punish is not the

" offence described by Art. 333 of the Penal " Code " and why because there was no hiring, no deposit, nor mandate in connection with the delivery of the receipted bill to Painter. In the present case on the contrary we have the admission by learned Counsel that the delivery of the money was accompanied with the mandate that Lutty should lay out the money so delivered in taking out the necessary licence for the cultivation of tobacco by the said Appadoo. The fact of the existence of a mandate brings the case within the terms and spirit of Art. 333 and this breach of trust is nothing more nor less than an embezzlement and the finding of the Magistrate must be supported.

Appeal accordingly dismissed with costs.

BAIL COURT

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APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE,—SEIZURE OF GOODS AND CHATTELS OF A SHIP OWNER FOR DAMAGES FOR NON DELIVERY OF GOODS SHIPPED ON BOARD HIS VESSEL,—17 AND 18 VICT: C. 104—SECT. 504.

In this case the Respondent had obtained a judgment awarding damages against the Appellant as owner of the bark " Barentin " for non delivery of goods shipped on board that vessel at Tamatave. The Appellant not paying the damages due by him, the Respondent caused his general goods and chattels to be seized. Thereupon the Appellant entered a plaint before the Senior District Magistrate of Port Louis in which he sought to have the seizure declared null and void. The Magistrate having dismissed the Appellant's plaint, this latter appealed on the ground that no seizure of the general goods and chattels of a ship owner could competently follow upon a judgment obtained against him in respect of non delivery of goods shipped on board his vessel; but that in accordance with the terms of Sect. 504 *of the Merchant Shipping Act of* 1854 *such judgment could only be executed by seizure and sale of the ship.*

Held that the Statute 17 *and* 18 *Vict: C.* 104 *Sect.* 504, *while limiting the amount for which ship owners were liable for loss and damage, did not put any restriction upon the mode in which such liability might be enforced, and that, in this case, the seizure could not be set aside on the ground that the liability of the Appellant as a ship owner could not be enforced by seizing his goods and chattels.*

The Court accordingly affirmed the Magistrate's judgment and dismissed the appeal with costs.

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A. DOCINTHE,—Appellant

versus

H. MARTIN,—Respondent

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Before

His Honor A. G. ELLIS,—Acting First Puisne Judge

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A. BOUCHERAT,—Of Counsel for Appellant
G. BOULOUX,—Attorney for the same

L. A. THIBAUD,—Of Counsel for Respondent
F. VICTOR,—Attorney for the same

Record No. 708

14*th March* 1879

This is an appeal against a judgment of the Senior District Magistrate of Port Louis, dated 20th February 1879, by which the learned Magistrate dismissed a plaint in which the Appellant sought to have a certain seizure of his goods and chattels by the Respondent declared null and void. As a preliminary objection to the appeal the Respondent pleaded that " The value of the matter in dispute " was under £ 20, and that accordingly the judgment was final and definitive to all intents and purposes.

The warrant to levy, in virtue of which the seizure complained of was effected, directed the Usher " to levy the sum of Rs 141.96 and further of Rs 110.33 *** " " by distress and sale of the goods and chattels " of the Appellant. This warrant followed upon a judgment condemning the Appellant as Merchant and Registered owner of the Bark *Barentin* to pay to the Respondent damages for non delivery of certain goods shipped on board the said Bark at Tamatave for conveyance to Mauritius together with costs of suit. The first sum mentioned in the warrant is the amount of the damages so found due, and the second is the amount of the taxed costs in the action. After the seizure was effected, the Appellant served a notice on the Usher calling upon him to stay proceedings in the above seizure and subsequently introduced the plaint, concluding for the nullity of the seizure, the judgment dismissing which is now submitted to review.

In support of his preliminary objection, the Respondent contended that the value of the matter in dispute must be determined by the principal sum found due to the Respondent in his action in damages, and that the costs could not be taken into account. In support of this argument the cases of *Barles versus Hugues* (Sauzier's Reports 1876 page 161) and of *Ramsamy versus Protector of Immigrants* decided in December 1878 (and not yet reported) were cited.

With the principles laid down in these decisions I entirely concur, but I do not think it necessary to examine how far these principles are applicable in the present case; as after fully hearing parties, on the merits of the appeal, I have arrived on different grounds, at the same conclusion as that come to by the learned District Magistrate.

The main reason urged by the Appellant in support of his appeal was that no seizure of his general goods and chattels, could competently follow upon a judgment obtained against him as owner of the Bark "Barentin" in respect of non delivery of goods and chattels shipped on board the said Bark. This contention he based on the terms of Sec. 504 of the Merchant Shipping Act of 1854 (Stat: 17 & 18 Vict: C. 104.) The question arising for consideration therefore is, whether the clause cited warrants the proposition that a judgment awarding damages against a ship owner for non-delivery of goods shipped on board his vessel, can only be executed by seizure and sale of the ship, and not of any other goods and chattels belonging to him.

The section referred to is in the following terms: "No owner of any seagoing ship or "share therein shall in cases * * * * " "(2) where any damage or loss is caused to "any goods, merchandize or other things "whatsoever on board any such ship * * * "be answerable in damages to an extent be- "yond the value of his ship and the freight "due or to grow in respect of such ship dur- "ing the voyage which at the time of the "happening of any such events is in prose- "cution or contracted for."

There is no doubt that this enactment creates an exception in favor of ship owners, in the cases specified, from the ordinary rule with regard to liability. At common law every one is liable to the full extent for loss or damage caused by him. In this instance however, the legislature has seen fit to affix a limit to the liability of ship owners for loss or damage resulting to third persons in the cases specified, the limit being the value of the ship and of the freight. But, while the *amount* for which ship owners are liable for loss and damage is thus limited by statute, it must be observed that no restriction is put upon the *mode in which such liability may be enforced.* The measure of the liability is declared to be "the value of the ship and freight," but the clause referred to nowhere enacts that this limited liability shall only be made good against the ship and freight. For the latter proposition, which is that maintained by the Appellant, I find no foundation in the clause referred to. It may be, and in most cases doubtless is the case, that the most sure and easy mode of enforcing judgments for damages in cases like the present is, by seizing the ship or her appurtenances; but when, as here, the party holding the judgment thinks proper to proceed against the goods and chattels of the owner, are such proceedings null and void? The clause referred to does not lead me to this conclusion, nor was any other enactment or authority to that effect cited at the bar.

I am accordingly of opinion that the seizure here made cannot be set aside on the ground that the liability of the Appellant could not be enforced by seizing his goods and chattels. As regards the amount of that liability—in this instance Rs 252.29—it cannot be maintained for a moment that "The value of the ship and freight," as these words are employed in the statute, was less than this sum; indeed it was admitted at the bar that the vessel in question has recently been sold by way of licitation, and fetched a sum vastly in excess of the amount mentioned.

I shall accordingly affirm the judgment of the learned Magistrate, in so far as it maintains the seizure and dismisses the plaint with costs, and further dismiss this appeal, also with costs.

BAIL COURT

APPEAL FROM JUDGMENT OF DISTRICT JUDGE OF SEYCHELLES.

Held in this case, that the judgment pronounced by the Acting District Judge of Seychelles on the 20th December 1875 *in proceedings to which the Respondents Nageon and Hoareau were not till subsequently made parties and against parties who did not then represent them, could not bind them, and was quoad them Res inter alios acta;*

That that judgment was not an interlocutory judgment which the Magistrate could at any

moment recall, in as much as it adjudicated upon the title of the Plaintiff to exercise the right on which the action against the Defendants was founded, and disposed of one of the main questions raised in this suit ;

That the judgment given by the District Judge on the 22nd September 1876, *if intended to touch the rights acquired by the Plaintiff under the judgment of 20th December* 1875, *was ultra vires and incompetent ;*

The Court accordingly recalled the judgment appealed against, but sustained the objection of the Respondents Nageon and Hoareau to the Appellant's title to sue and, quoad them, dismissed the action entered in the Court below, and found them entitled to costs in the Court below and on appeal.

Costs of appeal only were granted to the other Respondents, as such costs were incurred in consequence of the procedure adopted by the Appellant in the Court below.

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THOMY MARTIN,—Appellant

versus

LEFÈVRE AND WIFE, NAGEON AND HOAREAU,—Respondents

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Before

His Honor A. G. ELLIS,—Acting First Puisne Judge

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R. M. BROWN,—Of Counsel for Appellant
P. E. DE CHAZAL,—Attorney for the same

E. PELLEREAU, Of Counsel for Lefèvre & Wife
P. F. LASTELLE,—Attorney for the same

L. A. THIBAUD,—Of Counsel for Nageon
E. MARGEOT,—Attorney for the same

A. SAUZIER,—Of Counsel for Hoareau
H. THATCHER,—Attorney for the same

Record No. 657

14*th March* 1879

This is an appeal against a judgment pronounced by the District Judge of Seychelles on the 15th and formally drawn up under date 22nd September 1876, dismissing an action brought by the Appellant for the purpose of setting aside certain deeds, alleged by him to have been fraudulently granted by the Respondents, Lefevre and wife, to his prejudice as their creditor. In his plaint dated 20th November 1875, the Appellant alleges that during the Years 1872 to 1874 he carried on at Port Victoria a commercial business under contract with Messrs Wilson Swale & Co. of Mauritius, which was commonly known as the Seychelles Agency of Messrs Wilson Swale & Co. managed by Thomy Martin," which business was carried on on his sole responsibility ; that during 1872 the Lefevres—obtained, thro' him, large quantities of goods, from Messrs Wilson Swale & Co., and supplied themselves with goods from his store, and in this way became indebted to him for a sum of $ 2,619 ; that during this time the Lefevres were owners of considerable moveable and immoveable property, which in the course of the Years 1873 and 1874, they fraudulently conveyed away by certain deeds to Miss Treyce, a sister of Mrs Lefevre, to his prejudice.

To this action, as originally entered, the Respondents, Mr and Mrs Lefevre and Miss Treyce, were alone called as Defendants. When the cause came before the Court, these Defendants pleaded *inter alia* that the Plaintiff had no title to insist in this action as he was not their creditor. On 20th December 1875 this plea was repelled by the learned District Judge.

On 20th June 1876 the Respondents Messrs Nageon and Hoareau, who, in May and August 1875, had by Notarial Acts acquired from Miss Treyce certain of the properties, the conveyances of which to her were sought to be set aside, were made Defendants in the action, on the allegation that the conveyances in their favor were accepted by them in the knowledge that these deeds were fraudulently granted for the purpose of preventing the creditors of Mr and Mrs Lefevre from exercising their rights upon the said properties. On behalf of these Defendants the preliminary objection taken by the original Defendants to the effect that Martin, not being a creditor of Mr and Mrs Lefevre, had no title to sue, was again urged. This plea is dealt with in a judgment dated 15th September 1876, by which the District Judge sustained the objection but allowed the Plaintiff the option of a nonsuit. The Plaintiff having declined to take a non suit the learned District Judge pronounced the judgment now submitted to review dismissing the action with costs against the Plaintiff.

At the hearing before this Court a good deal of discussion arose with regard to the

construction to be put upon this judgment. The Appellant contended that the judgment dealt only with the case as against Messrs Nageon and Hoareau and left untouched the previous decision whereby the objection to the Plaintiff's title to sue is repelled *quoad* the Lefevres and Miss Treyce and urged that in any case it was incompetent for the District Judge to recall the judgment of 20th December 1875. This contention derives considerable force from the terms of the written judgment of 15th September 1876 by which the Plaintiff was offered the option of a non suit: As, not only does the District Judge not expressly recall his judgment of 20th December 1875, but he concludes in these words: " I am of opinion that he (that is the Plaintiff) must be nonsuited, and take a non suit *in connection with the case of the intervening parties*." But, it must be remembered that the judgment actually under appeal is not the non suit of 15th September, but the judgment dismissing the action the formal record of which is to be found in the proceedings under date 22nd September 1876. That judgment is in the following terms: "Upon " hearing this cause at a Court holden at Port " Victoria, Mahé, Seychelles on the 15th day " of September 1876, it is adjudged that " judgment should be entered for Defendant " (sic) and that the Plaintiff pay the sum of " by way of costs." The word *Defendant* here, must be a clerical error for Defendants because it is admitted by all parties that the judgment in any case deals with the suit both as against Nageon and as against Hoareau. So reading the judgment however, it is plain that it must be held to apply to all the Defendants, as no Defendants in particular are specified.

Voluminous reasons of appeal were lodged but at the hearing before the Court, the following were the main contentions of the Appellant: 1o. That the Respondents Nageon and Hoareau were bound by the judgment of 20th December 1875, and in presence of that judgment could not be heard to question the Appellant's title to sue: 2o. Assuming the rights of these Respondents to propone this objection, that the conclusion arrived at by the District Judge was unsound; And 3o. Assuming the soundness of the conclusion come to by the District Judge, that the judgment of 22nd September 1876 was *ultra vires* in so far as it dismissed the action as against the original Defendants the Lefevres and Miss Treyce.

With regard to the first point, after examining the authorities cited at the bar, I have no hesitation in coming to the conclusion that the judgment of 20th December 1875, pronounced as it was, in proceedings to which the Respondents, Nageon and Hoareau were not till subsequently made parties, and against parties who did not then represent them (the Notarial deeds in favor of Nageon and Hoareau being dated respectively in the preceding months of May and August) could not bind them, but was *quoad* them, *Res inter alios acta.*

As a subsidiary point it was contended that the Respondents Nageon and Hoareau, were not entitled to dispute the Appellant's character as creditor of the Lefevres. The action is one in which the Appellant seeks to set aside certain deeds in their favor. His right to insist in this demand is based on Art. 1167 of the Civil Code and depends upon his alleged character as creditor of the parties from whom their vendor acquired the properties, their rights to which are sought to be impugned. In these circumstances, it is clear that the Respondents Messrs Nageon and Hoareau have the strongest interest in disputing the right of the Appellant to challenge the deeds in their favor, and, having that interest, I know of no legal principle and no authority was cited, for holding them debarred from contesting his alleged character of creditor of the Lefevres and his consequent right to invoke the privilege accorded to creditors under Art. 1167 of the Code. Assuming the right of the Respondents, Messrs Nageon and Hoareau, to take this objection, the Appellant proceeded to contend that the conclusion arrived at by the learned District Judge, and to which effect is given by his judgment of 22nd September 1876, is unsound. In other words it was maintained that the evidence adduced established the Appellant's right to proceed under Art. 1167 of the Civil Code as a creditor of the Lefevres.

As we have seen the action is entered by Martin styling himself creditor of Lefevre and wife. The debt upon which the action proceeds is in the plaint alleged to have arisen in respect of " large quantities of goods and merchandise " which the Lefevres had obtained " from Messrs Wilson Swale & Co." thro' the Plaintiff and for goods with which they supplied themselves from the store kept by him. It is further alleged that on 20th April 1875 the account due by Defendants was presented for approval by Plaintiff and accepted by them, and that thereafter an action was entered against them for the balance of $ 2068.89 due by them, and judgment obtained for the said sum on 4th June 1875, and that, proceeding on that judgment, (which was not satisfied) Lefevre was subsequently imprisoned.

The proceedings here referred to were produced in the Court below and form part of the Record in this appeal. In order to deal with the objection to the Plaintiff's, now Appellant's, title to sue, it is necessary to refer to these proceedings. The plaint upon which judgment against the Lefevres was recovered on this account is dated 17th May 1875, and bears to proceed at the instance of " Richard Myles Brown, Barrister at Law, Acting on behalf of the Commercial undertaking Seychelles Agency Wilson Swale & Co. lately managed by Thomy Martin." At the outset therefore, we are met by this fact, that the person who now demands the nullity of the deeds granted by the Lefevres in favor of Miss Treyce, and by the latter in favor of Messrs Nageon and Hoareau, in virtue of his rights as creditor of the Lefevres under this account, is *ex facie* a person totally distinct from the person in whose favor judgment against the Lefevres has been obtained for the balance due under the account. The Plaintiff in this suit is Thomy Martin, the Plaintiff in the original action is Richard Myles Brown.

But, though nominally different, are the persons at whose instance both of these actions have proceeded really identical? In other words did Brown in the previous suit, act as representing Thomy Martin. The terms used by Brown in defining his character in the previous suit do not point at this conclusion. Brown does not there state that he acts on behalf of Thomy Martin. On the contrary, if that was the character in which he acted, he is studiously careful to conceal the fact. He declares himself to be acting " On behalf of the Commercial undertaking Seychelles Agency Wilson Swale & Co. lately managed by Thomy Martin." It is curious that if Brown instituted these proceedings on behalf of Martin, he should have been at such pains to hide his character under a cloud of words. But looking at the powers held by Brown at the date of the original action, can the contention that the judgment obtained in that suit was in favor of Martin, be countenanced. At the date when the action was entered (17th May 1875.) Brown was the holder of two powers of Attorney, one emanating from Wilson Swale & Co., the other from Thomy Martin. His first character is derived from a Notarial Act dated, May 1876. By that deed, one Giquel, who, under a Notarial Act dated 1st April 1875 was empowered by Messrs Wilson Swale & Co. to uplift and receive all sums due under any title and for any cause to the firm of Wilson Swale & Co. at Seychelles, and for this purpose was fully authorized to sue and defend in the name of his constituents, substitutes Brown in the mandate so entrusted to him. Brown's concurrent character as representative of Thomy Martin depends on a deed dated 30th April 1875. By this deed Martin empowers Brown, who is described as " the mandatary at Seychelles of Messrs Wilson Swale & Co." to recover all sums due under any title and for whatever cause to the store and commercial undertaking managed by him in Bazar street, and with that view to institute all proceedings competent to Martin himself. The deed goes on to declare that the said store and undertaking had never been the property of Martin, but was that of Wilson Swale & Co. of Mauritius, whose Agent it was notorious to the Public at Seychelles Martin was: The deed further explains that the reason why the foregoing power had been given to Brown was because, under the agreement between Wilson Swale & Co. and Martin, the latter was prohibited from binding them or rendering them responsible in any circumstances, and that consequently debts must be recovered in his name, and to authorise Brown as their mandatory to take possession and hand over to them all debts recovered by him.

Such being the position of Brown what is the necessary conclusion as to the character in which he acted when on 1st May 1875 he entered a plaint against the Lefevres; and on behalf of the commercial " undertaking lately managed by Thomy Martin " recovered judgment against them for the balance due on this account? The question appears to me to admit of but one answer. It is contrary, at once to the terms used by him in the plaint in describing his character, and to the tenor of the powers vested in him, to regard him as suing on behalf of Martin. He must be regarded as acting on behalf of Wilson Swale & Co., whose mandatory he was, and to whom Martin expressly states the store and commercial undertaking all along belonged, and to whom all sums recovered were to accrue.

Holding that judgment had already been recovered by Messrs Wilson Swale & Co. with the consent of Martin, on the account of 20th April 1875, I am of opinion that Martin could not in this suit found on that same account and the judgment thereon as entitling him to exercise the rights of a creditor of the Lefevres, and to obtain the annulation of deeds granted by the Lefevres and those to whom they sold. By the power of 30th April he had made over to Brown as mandatory of Wilson Swale & Co. any rights which might then have been competent to him under the account, and those rights having been exercised on behalf of Wilson Swale & Co. by Brown and judgment obtained in their favor for the debt, Martin cannot now propone the

debt as entitling him to act as the creditor of the Lefevres. Had Martin been able to show that Messrs Wilson Swale & Co. had made over to him the rights competent to them under the previous judgment and this account, the case might have been different, but that was neither alleged by the Appellant in his plaint, nor was any evidence establishing this, adduced in the Court below. There is, indeed, in the Record a document dated 13th October 1875 by which Martin transfers to Messrs Wilson Swale & Co. in guarantee of the balance due by him to them, certain accounts, and by which it is agreed between Martin and Messrs Wilson Swale & Co. that these accounts shall be recovered either in his or their name. The accounts so transferred are stated to be those mentioned in a note signed by Brown and dated 1st May 1875. This note has not been produced, and in its absence we must presume that the account due by the Lefevres was not included in the transfer.

It was argued that the Lefevres had, at its date, accepted the account as due to Thomy Martin. But as that acceptance could not (in presence of the subsequent power granted by Martin in favor of Brown) have availed as a defence in the action instituted by the latter, no more can it, after that action has been followed up and judgment obtained by Brown on behalf of Wilson Swale & Co., be advanced as conclusive that Martin is now the creditor of the Lefevres in respect of the debt due under this account. Under the power granted by Martin to the mandatory of Messrs Wilson Swale & Co. the latter was empowered to sue for and recover debts due to the store managed by Martin, and the amount due under this account having been so dealt with, Martin cannot now turn round and act as if no such power had ever been granted by him, or acted upon by the mandatory of Messrs Wilson Swale & Co.

I am accordingly of opinion that the objection taken by Nageon and Hoareau to Martin's right to sue as creditor of the Lefevres in virtue of the debt due by them under this account has been properly sustained by the learned District Judge.

Assuming however that the District Judge was right in sustaining the objection and in dismissing the Appellant's action so far as the Respondents Messrs Nageon and Hoareau are concerned, it remains to be considered what effect can be allowed to this judgment in so far as the Lefevres and Miss Treyce are concerned.

As we have seen a similar objection was proponed on their behalf at an earlier stage of the case and was then repelled by the District Judge in a judgment dated 20th December 1875. No appeal has been taken from this judgment and it is not therefore before the Court. It was argued on behalf of the original Defendants in the case that the District Judge by his judgment of 22nd September 1876 recalled his previous decision, and altho that does not clearly appear from the judgment of 15th September, I am inclined to construe the judgment of 22nd September as having been intended to have this effect. Putting this construction on the terms used by the learned Judge, it remains to be seen how far it was competent for him to recall his previous judgment.

It was contended on behalf of the Respondents the Lefevres and Miss Treyce that the judgment of the 20th December 1875 was a mere interlocutory one which it was competent for the District Judge to recall.

After referring to the authorities cited at the bar upon this point, I am clearly of opinion that the judgment of 20th December cannot be regarded as coming under the category of interlocutory judgments, which it was competent to the Judge pronouncing them at any moment to recall. The judgment in question decided not a mere incidental point relative to the procedure to be adopted in the cause, but adjudicated upon the title of the Plaintiff to exercise the right on which the action against the Defendants was founded, and disposed of one of the main questions raised in the suit. How vitally the merits of the case were involved in the question dealt with in that judgment, appears very forcibly from the fact that, had the District Judge then taken the view which he latterly adopted with regard to this objection, there would have been an end of the case, and the action would have been dismissed. I must accordingly hold that the judgment of 20th December was one upon which the Court below could not go back, and that the judgment of 22nd September, if intended to touch the rights acquired by the Plaintiff under the previous judgment was *ultra vires* and incompetent.

The conclusion to which we are thus led, vizt: That the judgment appealed against must be maintained so far as it dismisses the action as against Messrs Nageon and Hoareau, but quashed in so far as it affects or may have been designed to affect the rights of the Plaintiff against the Lefevres and Miss Treyce, is undoubtedly a most unsatisfactory and anomalous one. The anomaly however results from the procedure which has been followed in the Court below, where after the decision of a point vitally affecting the merits of the

action, a new set of Defendants were introduced, and as a consequence the same issue again submitted for adjudication as between them and the Plaintiff, and this time with a different result.

On the whole matter, for the reasons above stated, I shall recall the judgment appealed from, sustain the objection of the Respondents Messrs Nageon and Hoareau to the Appellant's title to sue, and *quoad* them dismiss the action and find them entitled to costs both here and in the Court below. As the costs incurred by the other Respondents in connection with this appeal, have arisen in consequence of the procedure adopted by the Appellant, I further find the Appellant liable in the costs incurred by them in connection with this appeal.

BAIL COURT

—

APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE, — DENIAL OF SIGNATURE,— PROOF OF THE SAME BY ORAL TESTIMONY.

In this case the Appellant, then Plaintiff, claimed before the District Court from the Respondent, then Defendant an account for goods sold and delivered exceeding 150 *francs. In support of his claim the Plaintiff produced an account alleged to have been approved and signed by Defendant. This latter having denied that the signature was his the Plaintiff was called as a witness and was asked whether the Defendant came to his shop after signing the account and admitted before witnesses having signed it. This question was objected to by the Defendant on the ground that, if allowed, it would be a means of proving by witnesses an admission of a debt exceeding* 150 *francs.*

The Magistrate having sustained the Defendant's objection, the Plaintiff appealed.

Held that the question was competent and that parole evidence could be adduced to prove that the signature affixed to the account was that of Defendant, in as much as by his denial the Defendant had confined to issue to the proof of the signature.

The Court, therefore, allowed the putting of the question and remitted the case back to the Magistrate to be proceeded with.

Costs reserved and to go with the merits.

MAHOMED,—Appellant

versus

LUTCHEE MARAZE,—Respondent

—

Before

His Honor Mr JUSTICE BESTEL,—Acting Chief Judge

—

W. NEWTON,—Of Counsel for Appellant
A. DESVEAUX—Attorney for the same

H. GALÉA,—Of Counsel for Respondent
E. MARGEOT,—Attorney for the same

Record No. 702

24th March 1879

In a demand against the Defendant below and now Respondent an account alleged to have been approved and signed by the Defendant was produced in evidence of the claim preferred by the then Plaintiff and now Appellant. On the production of the document the Defendant denied his signature. In order to prove the signature the Plaintiff who was examined as a witness in this case stated in the course of his examination that a creole was present at the signing of the account in Plaintiff's shop, but unfortunately the Plaintiff knew him not. On the question being put to the Plaintiff whether Defendant came to his shop after signing the account and admitted before witnesses having signed the account, the question was objected to by Defendant's Counsel below on the ground that it would be a means of proving by witnesses an admission of a debt exceeding Fcs. 150.

The objection was sustained by the Magistrate. Hence this appeal. A Plaintiff holding an account approved and signed by one to whom goods had been delivered comes forward with his account alleged to bear his approval and signature. At the Bar he meets with a denial by the Defendant of the signature affixed to the account as being his signature. What is he to do? Before proceeding any further he must first prove the signature to be that of the Defendant. Having done his best to obtain a written proof in the shape of an account approved and signed he must necessarily be allowed parol evidence. The issue was confined to the proof of the signature. And why should not this fact be proved by witnesses, or by a well authenticated and

solemn admission by the Defendant in presence of third parties.

The rules of practice for the District Court are silent on the one hand and on the other it has been said that it was very doubtful how far the Rules of the Colonial Code of Procedure on verification of writings apply or not to the District Courts. Assuming the Rules of the Code of Procedure are not applicable to the District Courts yet they may lead me to a correct solution of the issue now before me. The framers of Our Colonial Code of Procedure could not ignore, and must on the contrary have been fully alive to the enactments of the Civil Code on parole evidence. And we find under the head of "vérification d'écriture" Art. 193 &c. the enactment of Art. 195 C. P. C. "Si le défendeur dénie la signature à lui attribuée ou déclare ne pas reconnaître celle attribuée à un tiers, la vérification pourra être ordonnée tant par titre que par experts et par témoins."

And on reference to the annotations of Gilbert on Art. 195 C. P. C. Note 15 "lorsque la vérification a été ordonnée tant par titres que par experts et par témoins, la partie chargée de cette vérification peut *commencer* par la preuve *testimoniale* sauf à procéder ensuite, si elle le juge nécessaire à la vérification par titres et par experts"—See also Note 16 of Gilbert on the same article. The silence of the District Court Rules of Practice on this head has driven me to Cox and Loyd practice of the County Courts where I find no objection to the admission of parole evidence prayed for below (vide) Cox and Loyd C. C. P. page 376 Edition of 1852.

I shall and do therefore allow the putting of the question and to this end remit the case to the Court below to be proceeded with. Costs reserved to be dealt with by the Magistrate below with the merits.

BAIL COURT

—

APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE,—JURISDICTION OF THE SAME,—TITLE OF RESPONDENTS.

Held, in this case, that, as the matter at issue called into question the right of the Respondents to act upon their contract with the Municipality, the consideration paid for which amounting to Rs 24.000, the District Magistrate's jurisdiction was thereby ousted and that therefore he was right not to entertain the case submitted to him.

The Court accordingly dismissed the appeal with costs.

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VYDELINGUM,—Appellant

versus

DOCINTHE & ANOR,—Respondents

—

Before

His Honor Mr JUSTICE BESTEL,—Acting Chief Judge

—

H. GALÉA,—Of Counsel for Appellant
T. NICOLAS,—Attorney for the same

G. GUIBERT,—Of Counsel for Respondents
F. ROBERT,—Attorney for the same

Record No. 696

24th March 1879

This is an appeal from a judgment of the Senior District Magistrate of Port Louis, declaring his incompetency to entertain an action whereby the Plaintiff below and now Appellant sought to recover from the Defendants below and now Respondents as farmers of the Central Market of Port Louis, a sum of twenty five Rupees for an alleged illegal proceeding on the part of the now Respondents in having prevented the now Appellant from introducing into the said market vegetables to supply two stalls therein rented by him from the now Respondents, unless upon the previous payment of a charge of three pence upon each load of vegetables before introduction of the same into the said market; that such hinderance on the part of the now Respondents dated from the 13th to the 23rd July last inclusively. That by such illegal proceedings on the part of the now Respondents the now Appellant has sustained a loss of Rs 25 for which he now demands compensation.

Guibert pleaded to the jurisdiction of the District Court to entertain the cause which was nothing more nor less than challenging the right of the Municipality to enforce the tariff enacted for the Market in 1869 under which the present contract with the now Respondents was made, which would in fact be submitting to the consideration of the District Magistrate whether the Municipality had lost a right certainly of more than £ 50,

thus ousting the jurisdiction of the District Court. Thereupon *Galéa* for Plaintiff below urged upon the Court that if it had no jurisdiction as regards the first point, he contended that the sum demanded not exceeding Rs 25, the Magistrate was competent to entertain this secondary issue which the Magistrate again decided he could not entertain as it called into question the right of the then Defendants now Respondents to act upon their contract with the Municipality—the consideration paid for which amounting to Rs 24,000.

Of the 1st point I shall say nothing, *Galéa* having withdrawn the same from the cognizance of the Court below and of this Court.

I have merely to consider the second point insisted upon by *Galéa* (viz.) how far the Court below was competent to deal with the action in damages to the amount of Rs 25 for the wrongs alleged to have been sustained by the Appellant from the exacting payment of three pence per each packet of vegetables for the several days in the demand stated, and if entitled to claim payment of the extra three pence whether the farmers were not bound to give the now Appellant notice of this intention to enforce payment of the said extra three pence for some reasonable time before exacting the sum claimed. This question of notice would certainly have been resisted, and for its decision the now Respondents would have produced their contract with the Municipality. The Magistrate would then have had to ascertain therefrom whether such notice was incumbent upon the Municipality or its assignees. If such notice was not required in express terms, the Magistrate would have had to ascertain from the deed whether the necessity of such notice might not be clearly inferred from the several clauses of the contract between the Municipality and its farmers. This would necessarily have involved the right on the part of the District Magistrate to express an opinion on the merits or demerits of a title the very amount of which (viz.) Rs 24,000 necessarily would have ousted the jurisdiction of the District Court. The title would not be evidence merely of the matter at issue, but its legality might have been impugned and the Magistrate would have had to adjudicate on the validity thereof. The judgment appealed from must therefore be supported by this Court and I accordingly dismiss the appeal directed against it with costs.

SUPREME COURT

—

JUDGMENT BY DEFAULT FOR WANT OF A PLEA,—MOTION TO SET IT ASIDE,—AFFIDAVIT OF MERITS,—DISCRETIONARY POWERS OF SUPREME COURT TO SET ASIDE JUDGMENTS.

Held that upon an affidavit of merits a judgment signed by default for want of a plea, may, in the discretion of the Court, be set aside.

That this was a case in which the Court ought to exercise its discretionary power.

The Court accordingly set aside the judgment by default given against the Defendant on condition that he should file his plea in answer to the Plaintiff's declaration within 48 *hours—No costs.*

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PEERBUCCUS,—Plaintiff

versus

ESSUNDUR,—Defendant

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Before

His Honor Mr JUSTICE A. G. ELLIS,—Acting First Puisne Judge

and

His Honor Mr JUSTICE E. J. LECLÉZIO,—Acting Second Puisne Judge

—

H. HEWETSON,—Of Counsel for Plaintiff
A. DESVEAUX—Attorney for the same

G. PILOT,—Of Counsel for Defendant
V. BOULLÉ,—Attorney for the same

Record No. 20,167

27th March 1879

In this case, on the application of the Defendant a Rule Nisi was granted calling upon the Plaintiff to show cause "why the "judgment signed by default for want of a "plea at the Registry of this Court on the "27th day of December last year against "the Defendant on behalf of the said Plaintiff

...est in a case lately pending ...id Court between the said ...Defendant should not be recal... ...side."

...at the declaration in the suit ... back as June 1873. No ap... entered for the Defendant, and ... June, the Plaintiff obtained a ...lling on the Defendant to show ... judgment should not be signed ... a plea. On the return day 5th ...73—the Defendant appeared and ...leave to file a plea within 8 days ...ious payment of costs. Within the ...ed delay the Defendant settled for and on the 7th August 1873—served ...he Plaintiff " A plea in answer to declaration—and on the 11th of the same month the Plaintiff served a replication on the " Defendant. Neither the above plea nor " replication were filed at the Registry. No " further proceedings were taken in the suit " until the 27th day of December last year, " when on the application of Plaintiff a change " of Attorney took place and on the same " day the new Attorney took steps to have " judgment signed against the Defendant by " default for want of a plea.

In support of the application to have this judgment set aside, an affidavit sworn by the Defendant was produced narrating the facts, and alleging that he is not aware why his Attorney in August 1873—who has since ceased to practice before this Court—failed to comply with the order of the Court, and timeously to file his plea in the said action, and that he is advised and believes that he has a good defence to the action upon the merits.

The Plaintiff in shewing cause contended that the Defendant having failed to comply with the order of the Court in so far as it required him to " file " his plea, within a specified delay and judgment having been signed against him by default for want of a plea, could not now have that judgment set aside.

We think there can be no doubt that upon an affidavit of merits a judgment signed by default for want of a plea, may, in the discretion of the Court, be set aside. Looking to the whole circumstances of the case, we are equally clear that this is a case in which the Court should exercise its discretion by setting aside the judgment.

We accordingly make the Rule here absolute, and set aside the judgment by default of 27th December 1878—on condition that the Defendant do within 48 hours, file his plea in answer to the declaration of the Plaintiff. In the circumstances, and looking specially to the long delay which occurred between the last step in the process and the date at which judgment was signed, we shall not allow any costs in connection with this application.

SUPREME COURT

—

ACTION IN REVINDICATION OF A PLOT OF GROUND,—EXCEPTION OF RES JUDICATA—ART. 1351 C.C.

In this case the Plaintiff claimed the ownership of a plot of ground of 320 acres situate in the district of Plaines Wilhems, and asked that the Defendants should give and deliver up possession of the ground free from all charges and liabilities originating with the Defendants, without any prejudice to any claims against them for their unlawful occupation.

To this action the Defendants pleaded several pleas and inter alia, *that upon proceedings entered before the Master for the sale by licitation of the plot of ground in dispute, the Defendants and Plaintiff intervened to claim the same as being their property, and that the Plaintiff's application was dismissed by the Master, that therefore there was* Res judicata *with regard to the said land in so far as the Plaintiff was concerned.*

Held that the Master's judgment dismissing the Plaintiff's application, was in the nature of a preparatory judgment and that it could not be invoked as having the authority of Res judicata *in the sense of Article* 1351 *of the Civil Code.*

The Court accordingly repelled the exception raised by the Defendants and ordered the case to be proceeded with on the merits.

Costs reserved.

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COLONIAL SECRETARY,—Plaintiff

versus

DESVEAUX DE MARIGNY & ORS,—Defendants.

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Before

His Honor N. G. BESTEL,—Acting Chief Judge

and

Mr L. V' Delafaye,— Barrister at Law— Provisional Judge

—

L. Cox,—Acting Substitute Procureur General—Of Counsel for Plaintiff
J. Bouchet,—Attorney for the same

P. L. Chastellier,—Of Counsel for Defendants Desveaux
E. Leclézio,—Attorney for the same

W. Newton,— } Of Counsel for Giquel & ors
G. Guibert,— } Intervening parties
A. Rohan,—Attorney for the same

Record No. 19,447

2nd April 1879

The Plaintiff in this suit alleges in his declaration that the Mauritius Government is the owner of a plot of ground in the District of Plaines Wilhems of the extent of 320 acres or thereabouts, lying eastward of the concession Merlo and bounded as follows: on the north by a portion of land conceded to Frémicourt now belonging to Henry Finniss and by the land conceded to Odillard; on the east, by Dunois and Dubreuil, on the south partly by a portion of land conceded to Monneron, and partly by a portion of land conceded to Pitel and on the west by the concession Merlo aforesaid; Plaintiff further alleges that the Defendants have encroached upon and taken possession of that plot of ground without any right title or capacity and concludes by praying of the Court judgment decreeing 1o. That the Mauritius Government is the lawful owner of the land in question; 2o. That the Defendants shall give and deliver up possession of the same free from all charges and liabilities originating with Defendants and 3o. Without prejudice to any claims that the Mauritius Government may have against the Defendants for their unlawful occupation.

To this declaration Defendants have pleaded.

1st. That Government is without right to bring the present action;

2o. That they occupy no land belonging to Government in this District of Plaines Wilhems or elsewhere;

3o. That the portion of land of three hundred and twenty acres or thereabouts claimed from them by Government and which is situated in the District of Moka, belongs to them the said Defendants by virtue of written titles and forms part of the concession Merlo;

4o. That upon proceedings entered by André Giquel the wife against Zélomire Giquel and ors before the Master for the sale by licitation of the said portion of ground the Defendants as well as the Plaintiff intervened to claim the same as being their porperty and the Plaintiff's application was dismissed by the Master, that there is consequently "res judicata" with regard to the said land in so far as the Plaintiff is concerned. *Cox for Plaintiff*: the plot of ground which the Mauritius Government seeks to resume possession of, is of the extent of 320 acres or thereabouts and lies between the concession Merlo on the west and the concessions Dunois and Dubreuil on the east; the Defendants originally occupied that plot of ground as trustees of James Currie who was himself custodian of Government lands, the land passed through several hands: And in 1871, the Giquel family pretending themselves owners of it, sought to have it licitated before the Master of the Supreme Court. Upon the application of one of the Giquel family, the Master fixed the 2nd of March 1871 for the sale by licitation.

The Desveaux the Defendants in the present action, made an application for the nullity of the proceedings alleging that they were the owners of the plot of ground for having purchased it at the bar as forming part of the concession Merlo;

Government then presented to the Master a petition dated the 11th April 1871 stating that within the boundaries described as those of the plot of ground the licitation of which was followed up at the request of one of the Giquels, and claimed by the Desveaux as their property, was included a certain portion of land belonging to Her Majesty's Colonial Government and lying between the concession Merlo, on one side, and Dunois and Dubreuil on the other.

At this stage *Chastellier* for Defendants urges his plea of "res judicata" as raised on the fourth plea. He argues that all the requisites of Art. 1351 are to be found in the judgment given by the Master in June (21st) 1871, in connection with the sale by licitation of the plot of ground in question. He contends that the subject in dispute is the same; that the grounds upon which this claim is founded are the same and that the parties to this suit are the same acting in the same capacity as appeared before the Master—that the plot of ground to which Government now lays claim is the very plot of ground which was being licitated before the Master in 1871;

that Government then intervened claiming the property as its own and was represented then as it is now, by its Colonial Secretary acting in such capacity; that it claimed the plot of ground that was lying between the concessions Merlo, Dunois and Dubreuil or Hulot, not part of it, as has been attempted to be made out by his opponent, but the whole of the land, and in terms too clear and too precise to allow of the interpretation put upon them by Plaintiff vizt: "within these boundaries is included a certain portion of "land belonging to the Colonial Govern- "ment and lying between the said concession "Merlo and the concessions Dunois and "Dubreuil or Hulot"; that on the 21st of June 1871, the Colonial Government, by its Attorney, appeared before the Master and withdrew the application made by him on the 11th of April 1871 renouncing the claims therein put foreward by Government; that thereupon the Master made the following entry and gave the following judgment: "I "record the declaration of the said Jules "Bouchet, Attorney at Law, acting as afore- "said and dismiss the application of the Hon. "E. Newton Secretary to Her Majesty's "Government of Mauritius acting in the said "capacity"; that that judgment has settled the question and has finally disposed of the right of Government to the ownership of the 320 acres of land it now claims.

Cox in reply admits that the plot of ground sought to be licitated before the Master in 1871 and of which the Desveaux claimed to be the owners is the plot of ground which Government now tries to resume possession of. But he denies that, before the Master, Government ever claimed the ownership of that portion of land—he refers to the petition of the 11th of 1871 which shows clearly that Government did not know what was the portion of land that belonged to it. It was, it is true, stated to be between the boundaries Merlo, Dunois and Hulot; but it was not necessarily the whole—it might have been a very large, it might have been a very small portion of the whole. The conclusion of the petition is: "That the sale by licitation be stayed until "the rights of the several interested parties "be fixed, for which purpose among other "proceedings a general survey shall be "ordered of the portion of ground intended "to be licitated and also of each and every "one of the adjoining portions of land, so "that the position and extent of the portion "of land claimed by the Crown, may be "determined." That application was dismissed after a declaration had been made by the Government Attorney that he renounced his claim; but that claim was not a claim to the whole plot of ground, therefore the judgment cannot be said to apply to the whole—and if it applies only to part, it can not be said that the question of ownership of the whole has been set at rest and that there is *Res judicata.* He moreover contends that the question of ownership by Government of the plot of ground whether in whole or in part was never before the Master who simply dismissed the application such as it was—quotes several authorities to show that a judgment relative to a part, does not constitute *Res judicata* as to the whole.

JUDGMENT

The only question which the Court has, at present, to deal with is the one raised by the fourth plea of the Defendants which runs thus: "That upon proceedings held before "the Master for the sale by licitation of the "same plot of ground as is now sought to "be resumed possession of by Government, "Plaintiff and Defendants entervened to claim "the same as being their property and that "Plaintiff's application was dismissed, that "consequently there is *Res judicata* as far "as Plaintiff is concerned."

The facts upon which Defendants found their plea and as we gather them from the documents before us, are these: In the beginning of the year 1871 one of the members of the Giquel family asked the licitation of a plot of ground of about 320 acres situate in the District of Plaines Wilhems and bounded on the west by the concession Merlo and on the east by the concessions Dunois and Dubreuil or Hulot.

Subsequently a petition was presented to the Master, 20th February 1871, by the Desveaux, the Defendants in the present suit, in which they demanded the nullity of the proceedings in licitation upon the ground that they were the lawful owners of the land, the licitation of which was prosecuted by the Giquel; the petitioners having, as they averred, purchased the same at the bar of the Master as part of the concession Merlo. On the 11th April 1871, a petition was also presented to the Master, on behalf of the Mauritius Government by Bouchet Attorney-at-Law, wherein it was alleged that the applicant had learnt by perusing a number of the Government Gazette, of the intended licitation that, (and here we think it better to give the very terms of the petition because they have been, and rightly laid great stress upon by both Counsel) "within these boundaries "is included a certain portion of land be- "longing to Her Majesty's Colonial Govern- "ment and lying between the said concession

" Merlo and the concessions Dunois and " Hulot above mentioned."

The petition, after reciting that the Desveaux the Defendants in this case, have laid claim to the ownership of the plot of ground the licitation of which was being followed up, and that this plot of ground includes the land belonging to the Crown as aforesaid, concludes by the following prayer: " That a " day be fixed at which the interested parties " shall be called upon to attend and show " cause why the sale should not be stayed until " the rights of the interested parties shall have " been finally determined, for which purpose, " among other proceedings a general survey " shall be ordered of the ground so intended " to be licitated and also of each and every " one of the adjoining portions of land so " that the position and extent of the portion " of land claimed by the Crown as extending " between the concessions Merlo, Dunois " and Hulot be fixed."

On the 24th of April, after hearing the Giquels and the Desveaux, who although denying that Government has any right to the portion of land in question, offered no objection to the survey, the Master ordered a stay of proceedings and allowed the survey " so that the position and extent of the " portion of land claimed by the Crown as " extending between the concessions Merlo, " Dunois and Hulot may be determined if " there be any such portion of land lying " between the said concessions."

The survey, it seems, never took place and on the 21st of June 1871 Bouchet acting for Her Majesty's Government, appeared before the Master and declared " that he " withdrew his application contained in the " petition presented to the Master on the " 11th April 1871."

Thereupon, the Giquels and the Desveaux being duly represented, the Master recorded the declaration of Bouchet and dismissed the application of the Mauritius Government.

It is this judgment of the Master which the Defendants contend they can oppose to the Mauritius Government, as *Res judicata*.

The requisites which a judgment must fulfil in order to constitute *Res judicata*, are very clearly and concisely defined in Article 1351 of the Civil Code.

There is no doubt that the parties now before us, are exactly those whom the Master had before him, and that they are acting against each other in the same capacity in which they acted before the Master. It may also be said—though this point does not seem to us to be altogether free from difficulty—that the claim which was urged before the Master was based upon the same cause as the present action. But can it also be fairly maintained that the demand which was put forth, the " chose demandée " by the Mauritius Government before the Master was the same as the demand which it now makes.

The learned Counsel for the Desveaux has endeavoured to show, in his able argument that the land which the Mauritius Government had in view on the petition which it presented to the Master was the very identical land which it now seeks to recover possession of, while the learned Counsel for the Mauritius Government appeared very anxious to prove that the land which was meant in that petition was only part of the land claimed in the present action. We cannot concur with either of these extreme opinions which are not, according to us, borne out by the construction of which the petition of the Mauritius Government reasonably admits. The fact is, that the petition did not at all specify the extent of the land to which it referred nor did it give its exact position—the petition merely alleged, in very vague terms, that the Government of Mauritius owned ground between the concessions Merlo, Dunois and Hulot; so that the land which was said to belong to it, might comprize the whole of the land that was in course of being licitated and it might just as well be only part of such land; but it was not necessarily the one or the other—the best proof that it is impossible to put another meaning on the petition of Government is to be found in the conclusion of that very document. Had the petitioner intended to speak of the plot of ground itself which was in the way of being licitated and of none else, it would not have asked for a survey with the admitted object of determining the *extent* and *position* of the land which it stated belonged to it.

Be this as it may, it strikes us that the main point for us to look into and to decide is this: Did the Plaintiff in its petition to the Master call upon him to decide that the Mauritius Government was the owner of the plot of ground which was being licitated, it being admitted on all hands that such plot of ground is precisely the same which is now claimed by Plaintiff?

Whatever may be said with regard to the regularity or competency of the procedure which was followed before the Master by the Mauritius Government or its advisers; though it may be contended that the question raised

by the petitioner involved indirectly an issue of ownership in respect of the land sought to be licitated, yet, it is not difficult to discover the real object which the Mauritius Government aimed at, in its petition. It asked for two things : 1st. That a stay of proceedings should be ordered ;

2o. That a survey should be made of the portion of ground intended to be licitated, and also of each and every one of the adjoining portions of land, so that the position and extent of the portion of land claimed by the Crown as extending between the concessions Merlo, Lecoinstre Dunois and Dubreuil or Hulot, may be determined.

The Mauritius Government did not, therefore, like the Desveaux, in their petition, lay a distinct claim to the ownership of the land which was being licitated. It seemed to have considered that before putting forward any such claim, it was necessary that a preliminary or preparatory step should be taken viz : that a survey should be made. Being convinced that it had land somewhere or other, at the spot indicated by it, but not knowing what was the extent and position of the land, it was anxious to get evidence on this latter head and, for the purpose, it demanded a survey. But surely, the application for a survey with a view eventually to establish a right of ownership to land upon allegations of no precise character as to the extent and position of the ground intended to be claimed, cannot be looked upon as tantamount to a demand of the right itself, in the legal sense which these latter words bear. Indeed, however favorable to the Mauritius Government, might have been the survey prayed for, such survey would have been only an element of proof in support of Plaintiff's contention. After all, the best test,—both in a legal and practical point of view—to apply to the question into which we are now enquiring is this : Could the Master have adjudged after the survey, supposing it had been made upon the petition which he had before him, that the Mauritius Government was the owner of the land which was being licitated ?

We do not well see how, on the face of a petition in which the only prayer made by the Mauritius Government was that a survey should take place in order to determine the respective rights of the parties interested, the Master could have lawfully decreed that the Mauritius Government was the lawful exclusive owner of the whole plot of ground.

It is true that the survey, though allowed by the Master, did not take place, and that the Government withdrew its application and renounced the claim put forward in it. It is also true that the Master in his judgment recorded that renunciation. It has been contended that the word *claim* must be understood as meaning the claim to the ownership of the land which was in course of being licitated. No doubt it may have that meaning, but it may also mean simply the claim embodied in the prayer of the petition as to the survey. And as we cannot presume that the Mauritius Government intended to renounce more than it was competent to renounce, by consenting to its application being dismissed, we are bound to give this latter meaning to the word *claim* used in the petition and to consider that by acting as it did, the Mauritius Government cannot be looked upon as having renounced any thing more than what had accrued to it under the Master's judgment i. e. the right to have a survey made. At all events, supposing that there is any doubt in the matter, we must not forget that it is for Defendants, who are Plaintiffs on the exception, to satisfy us that they have established the requisites of Article 1351. Larombière under that Art. Parag. 158 says : " Dans le doute sur l'existence de toutes les conditions voulues pourqu'il y ait chose jugée, le juge doit répéter l'exception ; car c'est à celui qui l'invoque à l'établir et, s'il ne fait pas cette preuve, il doit être *débouté* de la fin de non recevoir qu'il oppose."

Be it observed, however, that the Mauritius Government may have renounced its right of ownership without there being *Res judicata*. But the question of voluntary renounciation, in a substantive and specific form, does not arise upon the pleadings as they are before us and is left entirely open.

For the reasons above given, we hold that the judgment of the Master of the 21st of June was in the nature of a preparatory judgment— that it cannot be invoked as having the authority of *Res judicata* in the sense of Article 1351. (Larombière Parg. 15.) We therefore repel the exception raised by the Defendants and order the case to be proceeded with. Costs to abide the event of the issue.

BAIL COURT

ACTION IN PAYMENT OF Rs 509 AND 49c. AMOUNT OF A PROMISSORY NOTE AND COSTS INCURRED TO RECOVER THE SAME,—GUARANTEE,—ART. 2016 OF THE CIVIL CODE,

Held, in this case, that the terms of the Defendant's letters imported only a limited gua-

rantee and that, therefore, Art. 2016 of the Civil Code could not apply.

The Court dismissed the Plaintiff's action and found the Defendant entitled to his costs.

—

ALFRED D'UNIENVILLE,—Plaintiff

versus

HUGH HANING,—Defendant

—

Before

His Honor A. G. ELLIS,—Acting First Puisne Judge.

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H. GALÉA,—Of Counsel for Plaintiff
W. G. LEBLANC,—Attorney for the same

L. ROUILLARD,—Of Counsel for Defendant
F. VICTOR,—Attorney for the same

Record No. 6,467

4th April 1879

In this action the Plaintiff claims from the Defendant payment of a sum of Rs 509.49c. This claim is based upon the allegations that the Defendant guaranteed payment of a promissory note for Rs 400 dated 24th December 1877 suscribed by one M. Tambyappin, payable to P. Tambyappin and endorsed by the latter in favor of the Plaintiff, and that the note not having been paid at maturity, judicial proceedings were taken by the Plaintiff against the Drawer and endorser in which costs to the amount of the balance of the sum sued for were incurred.

The Defendant in answer to the demand admitted that he had guaranteed payment of a sum of Rs 400 advanced by the Plaintiff to Mr Tambyappin, and deposited this amount in Court, but denied all liability for the balance claimed.

The circumstances under which the guarantee was given, as disclosed by the letters of the Defendant and his deposition were apparently the following: The Defendant, who is a mechanical engineer was engaged in 1877 in executing some work for Messrs Montocchio, and employed Mr Tambyappin in masonry work in connection with the contract. In December of that year the Plaintiff wrote to the Defendant, asking him whether he could advance Rs 400 to Tambyappin. In reply to this letter the Defendant wrote, under date 24th December, informing him that the settlement which he had to make with Tambyappin should take place on the 15th January then next; but would not probably be made until the end of February adding "Vous pourrez lui avancer une somme n'ex- "cédant pas quatre cent Roupies à l'échéance "du 1er Mars." The Defendant swears that when he wrote this letter he had no idea that a bill had been or was to be granted for the amount. As this statement is not contradicted by the Plaintiff who, although summoned as a witness, was not examined, I see no reason to doubt its accuracy, and must assume that the guarantee given by the Defendant was not for payment of a promissory note granted by Tambyappin, but simply as it bears to be of an advance not exceeding Rs 400 made to him by Plaintiff and falling due on the 1st March. Subsequently the Plaintiff wrote Defendant about the matter, and in reply the Defendant wrote, under date 4th March, stating that Tambyappin had asked him for the sum which "I have promised "you to retain on his settlement with us, in "order to repay the amount which you have "lent him"; that no settlement had yet taken place, and, when it did take place, would probably leave a large balance due by Tambyappin, nevertheless he adds "Je re- "tiendrai toujours pour vous, lorsque je tou- "cherai mon réglement la somme que je vous "ai autorisé à prêter à Tambyappin. Je "pense que nous aurons entièrement fini avec "Messrs Montocchio vers le quinze Avril "prochain." By a subsequent letter of 15th May the Defendant informed the Plaintiff that his settlement with Messrs Montocchio would not probably take place until the end of the month at soonest. From the Defendant's deposition it would appear that before writing the letter of 4th March he had become aware of the fact that a bill had been granted by Tambyappin—but neither in that nor in the subsequent letter do I find anything which would lead me to believe that he consented to guarantee payment of the bill, or in any way to modify the position in which he stood under his original promise.

Under the letter of 24th December then what is the position of the Defendant? By that letter he authorizes the Plaintiff to advance to Tambyappin a sum not exceeding Rs 400—and to that extent is liable to him in guarantee. Tambyappin was working for him, and in the ordinary course of things would have money to receive from him, and he undertakes to retain from the sum so due by him Rs 400 to repay advances made by Plaintiff.

It was contended that this was an indefinite guarantee, to which the provisions of Article 2016 of the Civil Code are applicable ; but this view I cannot adopt. The letter bears on its very face to be a guarantee for a definite sum. The Plaintiff has failed to show that the guarantee was other than it bears to be, and specially that it was as is alleged in his plaint " a guarantee for due " payment of the promissory note " held by him. If however the guarantee was a limited one, there is no question that in law it does not infer liability by the person granting it for expenses incurred in legal proceedings against the principal debtor. Troplong " du cautionnement " No. 149. Pont " Petits Contracts " Vol. 2, No. 98. A passage was cited from Pont (" Petits Contrats " Vol. 2 page 59 No. 107) in support of the contention that this was a cautionnement " indéfini " to which the principles laid down in Article 2016 of the Civil Code were applicable. I have carefully examined the decisions there referred to, but find nothing to modify my opinion that the terms of the Defendants letters here import only a limited guarantee. The Plaintiff has seen fit to resort to legal proceedings against the Drawer and endorser of the promissory note held by him, but the costs so incurred are not in my opinion a debt due by the Defendant. Further, having claimed these costs in this action as part of the amount due under the guarantee and having refused to accept the limited amount when tendered to him, the costs of this action must also fall to be defrayed by him. I accordingly dismiss this action, and find the Defendant entitled to costs. I further order that after deduction of the Defendant's taxed costs the sum of Rs 400 deposited in Court be handed over to the Plaintiff.

SUPREME COURT

—

NOTARY, — APPLICATION FOR A WRIT OF EXECUTION UNDER ORDINANCE 19 OF 1856 FOR FEES AND COSTS DUE TO HIM FOR WORK DONE IN COMPLIANCE WITH A JUDICIAL ORDER.

In this case the Plaintiff, a Notary Public, applied to the Court under Article 10 *of Ord.* 19 *of* 1856, *for an order authorising the Registrar of the Supreme Court to deliver a writ of execution on his behalf to enable him to enforce payment of certain notarial costs and fees due to him for drawing up a rectified deed of liquidation and partition in compliance with a reference made to him by the Court in the case of* Jourdain versus Hily and wife and ors.

The Defendants contended that the application could not be granted.

1o. *Because the judgments of the Court in the cases of Jourdain versus Hily having been appealed from to the Privy Council, the Court was* functus officio *and could not entertain the application.*

2o. *Because the work of the Notary not having been undertaken at the instance of the Defendants, the ordinary rule of law, by which parties going before a Notary are severally liable to him for his fees, did not apply, and that such fees could only be recovered from the party on whose motion the reference was ordered by the Court.*

Held 1o. *That the application made to the Court was not so intimately connected with the cases of Jourdain versus Hily now under appeal, as to restrain the Court from dealing with the claim made by the Notary for payment of fees due to him for work done in connection with those cases.*

And 2o. *That in the present case, although there was no common consent between the parties to go before a Notary for the purpose of entrusting him with the preparation of the deed in respect of which the costs and fees now claimed were incurred, yet the reference made by the Court must be deemed to have placed all the parties to the suit in an analogous position* quoad *liability for the fees due to the Notary, and that such reference must be regarded as constituting a judicial mandate in his favor at their instance in virtue of which the Notary was entitled to demand payment of his fees from the parties severally.*

The Court, accordingly, granted the application of the Notary, but under certain conditions.

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IN RÉ

THE HONORABLE L. L. RAOUL, —Plaintiff

versus

HILY & WIFE,—Defendants

—

Before

His Honor G. BESTEL,—Acting Chief Judge

and

His Honor A. G. ELLIS,—Acting First Puisne Judge.

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E. PELLEREAU,—Of Counsel for Plaintiff
J. ELIE,—Attorney for the same.

L. ROUILLARD,—Of Counsel for Defendants
V. G. DUCRAY,—Attorney for the same

Record No. 20,229

4th April 1879

This is an application at the instance of the Honorable L. L. Raoul for an order authorizing the Registrar of this Court to deliver a writ of execution on his behalf to enable him to enforce payment of certain notarial costs and fees due to him for drawing up a certain rectified deed of liquidation and partition of the community and succession of J. F. Hérout in compliance with a reference made to him by this Court in the case of *Jourdain against Hily*. The application is directed against Mr and Mrs Hily, the Defendants in that suit, and is made under Art. 10 of Ordinance No. 19 of 1856 which enacts that "Notaries may obtain by way of appli- "cation to a Judge at Chambers a writ of "execution to enforce payment of their fees "and disbursements, on their bills being "previously taxed." The matter was referred from Chambers to the Court.

The circumstances under which the reference to the Notary was ordered by the Court sufficiently appear from the judgment of this Court dated 29th March 1877, (Piston Vol. 17 page 22,) and by referring to the subsequent judgment dated 27th February 1878, (not reported), it will be seen that the Court subsequently approved of the deed of partition drawn up by Mr Raoul, and, proceeding thereon, found that a sum of 14,078.36 c. with costs was due by the Defendants to the Plaintiff Jourdain.

A petition for leave to appeal was subsequently presented by the Defendants, and leave having been granted the judgments are now about to be submitted to the review of Her Majesty's Privy Council.

The application of the Notary was opposed by Mr & Mrs Hily on the following grounds:

That the judgments of the Court having been submitted to review, this Court is *functus officio*, and cannot entertain this application:

And (2). That the work done by the Notary not having been undertaken at the instance of Mr and Mrs Hily, the ordinary rule of law, by which all the parties going before a Notary are severally liable to the Notary for his fees, does not apply, and that such fees can only be recovered from the Plaintiff on whose motion the reference was ordered by the Court.

With regard to the first objection we are of opinion that the application now submitted to us is not so intimately connected with the case of *Jourdain versus Hily*, now under appeal, as to restrain the Court from dealing with the claim advanced by the Notary for payment of the fees due to him for work done in connection with that case.

As to the second point, during the argument neither of the parties was in a position to cite to us any authority throwing light upon the question whether in such circumstances as the present the parties to a suit are or are not severally liable for costs and fees incurred to a Notary in virtue of a reference from the Court. After careful examination we have ourselves been unable to discover any authority upon this point. There are indeed a number of cases dealing with the question of liability for fees due to experts under closely analogous circumstances. The general current of these decisions appears to be unfavorable to the existence of liability against parties who have not either demanded the appointment of the experts, or prosecuted the expertise when that has been ordered by the Court *ex-officio*. These decisions however, turning, as to a great extent they do, on the construction of the terms of Article 319 of the Code of Civil Procedure, which is inapplicable to the question now before us, do not afford us any material assistance in its solution. The principle upon which each of several parties agreeing to go before a Notary, has been recognized as severally liable for the fees so incurred to the Notary, irrespective of questions of relief *interse*, rests upon Article 2002 of the Civil Code. In such circumstances the Notary is regarded, and justly, as the mandatory for a common object of each of the persons appearing before him, who are therefore individually liable to him for the honorarium due for his execution of the work entrusted to him. In the present instance there was no common consent between the parties to the action to go before a Notary for the purpose of entrusting him with the preparation of the deed in respect of which the costs and fees now claimed were incurred; but we are of opinion that in the circumstances the reference made by the Court must be deemed to have placed all the parties to

the suit in an analogous position *quoad* liability for the fees of the Notary. The order of the Court in compliance with which parties appeared before the Notary must, we think, be regarded as constituting a judicial mandate in his favor at their instance, in virtue of which he is entitled to demand payment of his fees from the parties severally.

We accordingly grant the application of the Honorable L. L. Raoul, but, in terms of his offer, we require him, prior to payment being made, to find security to refund the amount so paid to him in case it shall be decided by any competent Court that he is bound to refund the same, under reservation of his rights to appear and contest his liability to refund.

SUPREME COURT

—

LICITATION OF A SHIP,—AWARD OF MASTER OF SUPREME COURT A VALID TITLE FOR REGISTRATION OF A SHIP,—MERCHANT SHIPPING ACT OF 1854,—SECTION 58.

The Plaintiffs who had purchased the British Bark Barentin in virtue of a judgment of adjudication of the Master on the sale by licitation of the said Ship, moved the Court for a rule authorizing the Collector of Customs to register in his books the Barentin under the name of the Plaintiffs, and further to erase from his book the inscriptions against the said ship in as much as they, the Plaintiffs, had in compliance with the conditions of sale and with the Master's order deposited the full amount of their purchase price in the Master's office, and as the creditors mortgaged on the said ship had declared their intention to exercise their rights upon the sale price alone.

The Collector of Customs shewed cause and contended that he could not fulfil the formalities required by Sections 55, 56 *and* 57 *of the Merchant Shipping Act of* 1854 *for the transfers of ships as there was only one name on his register, and as no regular bill of sale from the registered owner had been produced to him; That the contre lettre upon which the heirs François founded their title to the ownership of one half of the Barentin was null under the Merchant Shipping Act, that the licitation was bad and that consequently the Master's award was not a valid title.*

Held that the Section of the Merchant Shipping Act of 1854 *which applied, in this case, was Section* 58 *;*

That a licitation followed by an award of the Master was a lawful means of acquiring the ownership of a ship, under Section 58, *and that such an award was a valid title entitling the party who produced it to the registration of the transfer of the ship purchased by him.*

The Court accordingly made absolute the Rule prayed for and directed the Collector of Customs to Register the "Barentin" under the name of the Plaintiffs upon the production by them of the Memorandum of conditions under which the licitation took place before the Master together with his award, and upon their making and signing the declarations and statements required by Sect. 58 *of the Merchant Shipping Act of* 1854 *and by Form H in the Schedule thereto.*

The Court further directed the Collector of Customs to erase the inscriptions which appeared on his Register against the Barentin.

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CAPEYRON & DELANGE,—Plaintiffs

versus

CHASTEAUNEUF & ORS,—Defendants

—

Before

His Honor A. G. ELLIS,—Acting First Puisne Judge

and

His Honor E. J. LECLEZIO,—Acting Second Puisne Judge

—

E. PELLEREAU,—Of Counsel for Plaintiffs
A. ROLANDO,—Attorney for the same

E. M. WOOD,—Substitute Procureur General,—Of Counsel for Defendants
J. BOUCHET,—Attorney for the same

17*th April* 1879

This is a motion for a Rule of this Court

"As a matter of right whenever it can be "shown that any Inferior Court has been "guilty of an excess of jurisdiction." We are not prepared on the strength of the single decision referred to by Comyn, the exact scope of which, (in the absence of any details of the case in which it was pronounced) it is impossible to determine, to hold that the fact of an appeal having been competent here, which besides is disputed by the Applicants, excludes the Court from entertaining an application for the issue of a writ of Prohibition.

It was further contended that the writ could not issue after judgment had been pronounced by the learned Magistrate. In this respect, the Courts have recognized a distinction. In cases where the want of jurisdiction, which is the basis of such applications, is apparent on the face of the proceedings sought to be restrained, a prohibition may issue at any time before or after judgment, because the whole proceedings are a nullity. But, where the want of jurisdiction does not appear *ex facie* the record, and no objection is made in the Inferior Court, the Superior Court will not grant a prohibition of the judgment as the party is held to be barred by acquiescence. Where however an objection has been taken to the jurisdiction of the Inferior Court, a Prohibition may issue even after judgment.

In the present instance it was alleged by the Applicants, in the course of the argument, that the want of jurisdiction appeared *ex facie* the proceedings before the Magistrate, but as this is not set out in the affidavit upon which the application is based, we should have hesitated to proceed merely on this allegation. It is distinctly alleged, however, in the affidavit that objection was expressly taken in the District Court to the jurisdiction of the learned Magistrate, and this being so no asquiescence can be pleaded against the Applicants, and they are not excluded from applying for a Prohibition even after judgment.

From what transpired at the argument, we are satisfied that to say the least, there is room for grave doubts whether the proceedings were within the jurisdiction of the District Court, and we shall accordingly grant a Rule Nisi calling on the Respondents to show cause why a writ of Prohibition should not issue restraining further proceedings in the Court below. Costs reserved.

SUPREME COURT

—

ACTION IN PAYMENT OF Rs51,164.38 AMOUNT OF AN OBLIGATORY WRITING,— COMMERCIAL PARTNERSHIP,—LIABILITY THEREOF.

Held in this case, that there was no doubt that from the documents produced, the partnership A. Paturau & Co. was a commercial partnership entered into for the purposes of carrying on the trade of Engineering ;

That the debt due to the Plaintiffs was due by the partnership, and not by each of the partners individually for one third ; and that the liability of the partnership had not ceased on account of the obligation signed by George Robinson in May 1876 *and accepted by the Plaintiffs.*

The Court, therefore, gave judgment for Plaintiffs with costs in the sum claimed with interest at 10 *per cent from the* 1st *January* 1879.

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CASTEL & WIFE,—Plaintiffs

versus

PATURAU & Co. AND ORS—Defendants

—

Before

His Honor A. G. ELLIS,—Acting First Puisne Judge.

and

His Honor Mr JUSTICE LECLÉZIO,—Acting Second Puisne Judge

—

L. ROUILLARD,—Of Counsel for Plaintiffs
H. THATCHER,—Attorney for the same

E. PELLEREAU, E. GALLET,— } Of Counsel for Defendants
F. LASTELLE,—Attorney for the same

No. 20,078

24*th April* 1878

This is an action entered by Plaintiffs

against the Defendants in order to obtain a judgment condemning them to pay the principal sum of 24000 dollars with interest thereon at ten per cent per annum from the first of April 1875.

The said principal sum is averred in the declaration to be the balance due at the date of the 31st March 1875 for money lent in virtue of an obligatory writing dated the 13th March 1873. In the course of the trial an account was filed to which an addition signed by the Attorney for the Plaintiffs was made, and which now brings the principal sum claimed to the amount of Rs 51,164.38—and it is for this latter sum that judgment is now prayed for by the Defendants.

In the declaration the Defendants are described as 1o. The Civil partnership a Paturau & Co. 2o. Benoit Fontaine, one of the members of the said partnership. 3o. John Smith of the District of Flacq, Engineer. 4o. André Paturau; the said John Smith and André Paturau being members of the partnership A. Paturau & Co. Thomas Henry Thompson is also called as a Defendant, as guardian of the minor Wilhelmina Jane Hamilton on account of her interest in the succession of the deceased wife of John Smith. The guardian of the said minor filed a plea in which he declares that he abides by the decision of the Court, but Benoit Fontaine and John Smith as well as André Paturau made several objections in their pleas filed in the Record to judgment being taken against them. However when the case was argued before the Court Benoit Fontaine and John Smith by their Counsel *Pellereau* declared that upon consideration of the documents, they could not resist the pretentions of Made Castel and did finally abide by the decision of the Court as to the balance due by them.

Mr Gallet for André Paturau who is absent from this Colony, but only represented by his Agent, argued that judgment could not be taken against the partnership because the title given to Plaintiffs and upon which they sued, was signed by the partners individually, and the partnership as stated by the Plaintiffs themselves was a " Civil Partnership "; that besides in an obligation signed by George Robinson on the 25th May 1876—and accepted by Plaintiffs; they reserved their rights against their debtors *individually*, which means a renunciation of all rights against the partnership—and that as a consequence his client Paturau was liable only for one third of the balance now due to Plaintiffs. *Rouillard* for Plaintiffs answered that it was by mistake that the partnership A. Paturau & Co. was called in the declaration a " Civil Partnership ", and that the Book of that partnership (which he produced) and upon which he examined the Accountant of that firm Mr Touyé as well as judicial documents, such as the extract posted up according to Law by the Registrar of this Court of the Society formed between the Defendants, and the Memorandum of distribution of the sale price of the Engineering Establishment having belonged to them—shewed that the partnership was a Commercial one and that they were traders. He therefore moved that the word " Commercial " be substituted in the declaration to the word " Civil ". As to the act signed by Robinson and accepted by the Plaintiffs it was a private agreement between Robinson and them, which cannot be invoked by the Defendants, and it had not the bearing sought to be attributed to it. The papers in this case were referred to the Ministère Public on account of the presence of the minor Hamilton called as Defendant, and his written conclusions have been filed in the Record.

JUDGMENT

After looking carefully at the evidence in this case, we are of opinion that the Plaintiffs are entitled to sign judgment against the firm A. Paturau & Co. for the amount of Rs 51,164.38 with interest from the 1st January last at ten per cent per annum.

It is true that the obligatory writing of the 13th March 1873 is signed by the partners individually but it appears from the evidence of Mr Touyé who was the Accountant of the firm that the sum lent figures in the Account Current Book of that firm, and the presumption must be that it was employed for the purposes of the trade carried on by A. Paturau & Co. It is also shewn that the Plaintiffs were collocated at the distribution by the Master of this Court of the sale price of the Engineering Establishment called " Les Forges & Fonderies " which belonged to the partnership A. Paturau & Co. and that no question was raised before the Master either by the debtors or their creditors as to the right of the Plaintiffs to share in the price of a property which was that of the partnership, and not of the partners individually. We have therefore no hesitation in coming to the conclusion that the debt due to the Plaintiffs is due by the partnership and not by each of the partners individually for one third; and it has been argued for Paturau that at all events if the partnership had become liable towards Plaintiffs, such liability had ceased, because on the 25th May 1876 the Plaintiffs had accepted an obligation of Georges Robinson which contained certain reser-

vations as to the exercise of their rights. We have read this obligation with great attention, and we do not think that the Defendant Paturau is justified in giving to it the interpretation which he now wishes us to adopt. We do not wish to express any opinion now with regard to the extent of the renunciation made by Plaintiffs by their acceptation of the writing of the 25th May 1876 in so far as the exercise of their rights upon property then belonging to A. Paturau & Co. is concerned, but we certainly think that they did not intend to abandon the right of obtaining a judgment if they thought it necessary to do so against the partnership named in the said writing, and of thereby constituting each of the partners their debtor for the whole amount due to them.

As to the denomination of the partnership itself, it is clear from the documents now under our eyes, that it was a commercial partnership entered into for the purposes of carrying on the trade of Engineering; the error contained in the declaration cannot therefore be considered by us otherwise than as a clerical error which could not in any way be prejudical to the defence of the Defendants who must have known full well what their partnership was. We accordingly order that the word "Commercial" be substituted in the declaration to the word "Civil" and that judgment be entered against the Commercial partnership A. Paturau & Co. of which Benoit Fontaine, John Smith and André Paturau are the members for the sum of Rs 51,164.38—with interest at 10 per cent from the 1st of January 1879—on behalf of the Plaintiffs. With costs.

SUPREME COURT

—

ATTACHMENTS,—TITLES OF ATTACHING PARTIES,—CIVIL PARTNERSHIP A MORAL BEING, PROMISE TO PAY BY THIRD PARTY,—INTERPRETATION OF DEEDS.

Held that the true interpretation to be given, in this case, to the successive deeds of sale relative to the Estate St. Hubert which had remained mortgaged towards the Crédit Foncier, was that the successive purchasers, in buying an estate burdened with a debt declared by the seller to have been taken charge of by a third party, must be considered to have been in the shoes of the original parties to whom that third party promised to pay in so far as the right of indemnity was concerned;

That the parties liable in the last instance were the last owners of St. Hubert whose interest, as third holders, was to pay the debt burdening the estate, and that these parties paying through the adjudicatee were the owners who had been expropriated in 1876 viz. B. Fontaine, J. Smith and E. Basset;

That they alone had a recourse against Dauban, not individually but as forming the Civil partnership B. Fontaine & Co.

That partnerships, whether Civil or Commercial, were moral beings having interests distinct and separate from the individuals who composed them;

That therefore the only creditors entitled to attach the sum eventually due by Dauban were the social creditors of B. Fontaine & Co. and not the personal creditors of B. Fontaine, of J. Smith or of E. Basset, the individual members of that partnership.

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CASTEL AND WIFE,—Plaintiffs

versus

B. FONTAINE & ORS,—Defendants

—

ORIENTAL BANK,—

versus

B. FONTAINE & Co. & ORS,—

—

MAURITIUS COMMERCIAL BANK,—

versus

B. FONTAINE & Co. & ORS.

—

DEYMIÉ,—

versus

B. FONTAINE & Co. & ORS,—

—

GAUTREAU & Co.,—As Successors of E. LACHAMBRE GAUTREAU,—

versus.

B. FONTAINE & Co. & ORS,—

GAUTREAU & Co.,—Both in their own name and as Successors of E. LACHAMBRE GAUTREAU & Co.

versus

B. FONTAINE & Co. & ors.

—

MITCHELL.

versus

FONTAINE & SMITH.

—

MITCHELL.

versus

B. FONTAINE.

—

Before

His Honor A. G. Ellis,—Acting First Puisne Judge

and

His Honor E. J. Leclézio,—Acting Second Puisne Judge

—

L. Rouillard,—Of Counsel for Castel and Mitchel
H. Thatcher,—Attorney for the same

E. Pellereau,—Of Counsel for Fontaine & Co.
F. Lastelle,—Attorney for the same

G. Guibert,—Of Counsel for Gautreau & Co.
F. Robert,—Attorney for the same

24th April 1879

These are actions in validity of attachments lodged in the hands of August Dauban the owner of an Estate situate in the District of Grand Port and known by the name of "Beau Vallon."

The Plaintiffs' title are not all the same—Castel and wife have a claim against the partnership known as A. Paturau & Co. the members of which are André Paturau, Benoit Fontaine and John Smith, Engineers having carried on their trade in the town of Port Louis. Mitchell is the creditor of Benoit Fontaine and John Smith alone. The Oriental Bank and the Mauritius Commercial Bank in whose rights Auguste Deymié now is, were holders of bills signed by B. Fontaine & Co., a Civil Partnership composed of Benoit Fontaine, John Smith and Emilien Basset, and until recently the owner of the Estate called "St. Hubert" situate in the district of Grand Port.

Auguste Deymié, as well as Gautreau & Co. are also the creditors of the same partnership B. Fontaine & Co. The claim attached is said to be due by Auguste Dauban, owner of Beau Vallon Estate, to the owner of St. Hubert Estate under the following circumstances :

In 1864 and 1865 Jean Cantin, then sole owner of Beau Vallon and St. Hubert, borrowed from the Credit Foncier of Mauritius a sum exceeding $ 130,000, and gave a mortgage to that Company on his two Estates in guarantee of the reimbursement of the claim.

In September 1865, Cantin sold to H. Portal, B. Fontaine and J. Smith one third of Beau Vallon and of St. Hubert, and in the deed of sale a delegation was made by Cantin in favor of the Credit Foncier.

In February 1867, by an act under private signatures, deposited in March 1878 with Notary Geffroy, Cantin sold to Dauban one ninth of the two Estates Beau Vallon and St. Hubert.

In March 1867 Cantin sold to the same Dauban one third of the said two Estates.

In February 1869 two deeds of sale were made—by the first Cantin sold to Dauban two ninths of Beau Vallon and by the second deed, Portal, Fontaine and Smith sold to Dauban the third of Beau Vallon which they had purchased from Cantin in 1865.

By means of these two last sales, Dauban become sole owner of Beau Vallon ; he abandonned all his rights in St. Hubert to Cantin, Portal, Fontaine and Smith, and he undertook to pay the whole debt due to the Credit Foncier and which was mortgaged on the two Estates. It must be here observed that the Credit Foncier was no party to that arrangement, and its mortgage continued to burden the two Estates.

On the 6th April 1871 Cantin sold the share remaining to him in St. Hubert to Fontaine, Smith and Portal ; and on the 14th of the same month and year, Portal sold his

share in the same Estate to B. Fontaine and J. Smith who thereby became the sole owners of St. Hubert.

On the 17th April 1873 Fontaine and Smith sold to Basset two sixteenths of St. Hubert and charged him to pay the two sixteenths of the mortgage debts; among others, that due to Gautreau & Co. and as to the claim of the Credit Foncier burdenning St. Hubert as well as Beau Vallon, they explained that Dauban had bound himself to pay it.

On the same day (17th April 1873) a Civil Partnership was formed between Fontaine, Smith and Basset under the style B. Fontaine & Co. for the working of St. Hubert, and it was stipulated that their social capital (mises sociales) was composed of their undivided shares in the said Estate.

In 1876 B. Fontaine & Co. were expropriated at the request of Gautreau & Co. and their Estate St. Hubert, was awarded to Portal. At the distribution by way of "ordre" which ensued, the Credit Foncier produced for the claim remaining due to it, and was collocated for $ 32,000.

If Portal the adjudicatee, pay the warrant of payment issued to the Credit Foncier for its collocation, the Estate St. Hubert will have paid a debt due by Dauban, and, in virtue of the obligations contained in the aforesaid two deeds of sale of February 1869, it will have the right to claim back from this latter the amount paid upon its sale price.

This proposition is admitted by all the attaching parties, but they do not agree as to the parties who represent the Estate and who would be entitled to claim from Dauban.

The holders of the bills and other obligations signed by B. Fontaine & Co. viz: Deymié and Gautreau & Co. say that this partnership alone, as the last owner of St. Hubert is entitled to be indemnified by Dauban; whereas Castel and wife and Mitchell whose titles respectively come from A. Paturau & Co. and Fontaine and Smith individually pretend that their debtors B. Fontaine and J. Smith together with Cantin and Portal, are the persons entitled to recourse against Dauban, because it is to them that the promise was made by this latter in 1869, to pay the Credit Foncier, and they further maintain that if the last owners are the parties entitled to exercise such recourse, they must do so individually and not under the style of B. Fontaine & Co., as this partnership being merely a Civil one and having no legal existence as a moral being, the personal creditors of the partners must come *pari passu* with the social creditors.

Before we examine the question of knowing whether under the Civil Code a Civil Partnership is or is not a moral being which gives to it rights, and imposes upon it duties, distinct from the rights and duties of the individual members of such partnership, we think it is necessary to settle at once the point raised as to which parties are entitled to a recourse against Dauban in case of payment of the collocation of the Credit Foncier by Portal the adjudicatee. It appears to us that the proposition of Castel and wife and of Mitchell according to which such recourse would belong to the persons who were proprietors of St. Hubert in 1869, is untenable: it is true the promise was made to Cantin, Portal, Fontaine and Smith in 1869, but Cantin and Portal sold their shares to B. Fontaine & J. Smith who sold part of their shares to Basset. The Estate St. Hubert having remained mortgaged towards the Credit Foncier, and its owners being eventually liable to pay the debt, or part of the debt, due to that Company, the true interpretation to be given to the successive deeds of sale is, that the successive purchasers, in buying an Estate burdened with a debt, declared by the seller to have been taken charge of by a third party, must be considered to be in the shoes of the original parties to whom that third party had promised to pay, in so far as the right of indemnity is concerned. According to Art. 1251, § 3—of the Civil Code "la "subrogation a lieu de plein droit au profit de "celui qui étant tenu avec d'autres, ou pour "d'autres, au paiement de la dette, avait "intérêt de l'acquitter:" Here the parties liable in the last instance were the last owners of St. Hubert, and their interest as third holders, was certainly to pay the debt burdenning the Estate. Now the only parties who are entitled to a recourse against Dauban are those who pay, and it is clear that those who will pay through Portal, the adjudicatee, are the owners who were expropriated in 1876, that is to say Fontaine, Smith and Basset, and not Cantin, Portal, Fontaine and Smith, the owners in 1869—although it was to them that Dauban then promised to pay the Credit Foncier.

But is it to Fontaine, Smith and Basset individually that such recourse belongs, or is it to the Civil partnership B. Fontaine & Co., whose members they were?

Here arises the question of knowing whether a Civil partnership is a moral being distinct from the persons who compose it, and whether, as a consequence, the social cre-

ditors of the partnership have a right of preference on the assets of the partnership, or must come *pari passu* with the personal creditors of the members of the partnership ?

Many authorities were quoted on both sides, and the question was fully argued.

We do not find in the decisions of this Court which have been laid before us (Deltel versus Pilot 1863, page 129—Brodie versus Bestel 1863, page 122—Rougé versus Credit Foncier 1874, page 26) that the point has been raised as it has been in this case; but it would appear from these judgments that no one thought of contesting the character of moral being to a Civil partnership; and indeed if we are to consider the text of the Articles of the Civil Code in the title " Société ", we are at a loss to understand why a distinction was made by certain authors between Civil and Commercial " Sociétés ", with regard to that very important feature, the distinct and separate existence of the "Société" as a moral being. It is no where declared in an express manner in our Laws that a Commercial partnership is a moral being, and has a personality distinct from that of the individuals who compose it; and yet the same authors who recognize such attributes in a Commercial partnership, deny it to a Civil partnership. If we read Articles 1845, 1846, 1849, 1851, 1852, 1859, 1860, 1863, 1867, we see that altho' the Civil Code does not state in precise words that a " Société " is a moral being distinct from its members, it has impliedly given to it such a character. In those Articles rights and duties are attributed to the " Société "—perfectly distinct from those of its members; and Art. 1860 which enacts, " L'associé qui n'est point admi-" nistrateur ne peut aliéner ni engager les " choses même mobilières qui dépendent de " la Société "—has appeared to Mr Bravard to be so decisive that he has come to the conclusion that the social debts must be paid by the social assets before the personal debts of the partners. Learned disquisitions to the contrary have been read to us, but they do not seem to emanate from practical Lawyers; the opinion of Pothier has also been quoted, but that eminent Jurisconsult, as Bravard shews distinctly, did not at all events go so far as the Civil Code in its Article 1860, since he considered that a partner could alienate or pledge the property of the partnership, at least for the share he had in it; and it is this passage of Pothier that has led people to infer that he did not consider " Sociétés " as moral beings.

An argument has been taken from Art. 69 § 6 of the Code of Civil Procedure—according to which: " Seront assignées.....les " Sociétés de Commerce tant qu'elles existent, " en leur Maison Sociale et s'il n'y en a pas, " en la personne ou au domicile de l'un des " associés." And it was said that it must be inferred from the text of this paragraph, that Civil partnerships being sued differently from Commercial partnerships, that is to say, as ordinary individuals are sued, they were not considered by the Legislator as a moral being distinct from its members.

This argument *à contrario* does not appear to us to be conclusive the real reason, for the § 6 of Article 69, Civil Procedure, is no doubt that in a Commercial partnership the partners being bound in solido, each of them has the greatest interest to defend the action, and it has been thought useless to call all of them individually before the Court; whereas in a Civil partnership no solidarity exists, and the interest of one of the partners only in the defence is not of the same importance. It may be added that the Court of Cassation has more than once overruled this argument.

The jurisprudence of that Court had for sometime made a distinction in favor of Civil partnerships recognized by the state, or by a departmental authority, but such distinction has long since been abandoned (Sirey Devilleneuve 1866, 1.415).

This distinction had been criticized by Mr Troplong who showed that the intervention of authority was necessary only for the creation of public moral beings such as Colleges, Corporations and Municipalities but not for private moral beings such as Civil partnerships.

Basing our opinion not only upon the commentaries of men like Troplong, Delangle, Marcadé, Bravard and others, and upon many decisions of the Court of Cassation, of the Court of Paris and Grenoble quoted by Dalloz verbo " Société " No. 182 in fine and of the Court of Orléans, 1870 — 2.113, but also upon the general considerations which result from the constitution of a partnership, Civil or Commercial, we have no hesitation in saying that a Civil partnership is a moral being perfectly distinct from the persons who compose it. If another conclusion could be arrived at, the true object of the formation of a partnership could not be attained. If the personal creditors of each partner could come *pari passu* with the creditors of the partnership, the credit of those associations would be struck at its very root and it is probable that there is not a money lender who would consent to run the risk of entrusting his funds to a body the different members of which would have the right to pledge the Assets of the Association for his personal affairs. The very nature of a contract of partnership is repugnant to such a system; it is entered into with the view of organizing a common

enterprize having rights separate from the individual rights of its members, and as a consequence, duties and obligations also separate; if those rights and duties were to be confounded, third parties would carefully avoid all intercourse with such associations, and they would soon come to an end. It is therefore the interest of all, that partnerships, whether Civil or Commercial, should be treated as moral beings having interests distinct and separate from the individuals who compose them.

In the case before us, the owner of St. Hubert expropriated in 1876— was the partnership B. Fontaine & Co.; it is this partnership that will pay through Portal, the adjudicatee, the collocation made to the Credit Foncier of Mauritius, and will have, as a consequence, a recourse against Dauban for the reimbursement of the sum paid by means of the sale price of the Estate sold upon them. We must therefore hold that the only creditors entitled to attach the sum eventually due by Dauban are the social creditors of B. Fontaine & Co. and not the personal creditors of B. Fontaine of J. Smith or of E. Basset, the individual members of that partnership.

Having come to this conclusion, we do not think it necessary to examine the argument urged by the social creditors of B. Fontaine & Co. against Castel and wife, according to which these latter had renounced the power of exercising their rights on their debtor's assets existing at the date of an obligatory writing signed by Geo. Robinson on the 25th May 1876, and already referred to in the judgment of the case of Castel and wife versus A. Paturau & Co. The papers in these cases were referred to the Ministère Public on account of the presence of the minor Hamilton in them, and his written conclusions have been filed in the Registry.

We order that the attachments lodged by the Oriental Bank and the Mauritius Commercial Bank in whose rights Deymié now is, by Deymié personally and by Gautreau & Co. be alone validated. It was admitted by Deymié and Gautreau & Co. that Benoit Fontaine, John Smith and Emilien Basset were no longer personally liable towards them, and that they had reserved their rights upon the property of B. Fontaine & Co. we accordingly order that the costs of the Procedure for the validity of the attachments validated, shall be paid out of the sums attached in the hands of Dauban, and that the costs of the interventions and of the discussion upon the rights of the attaching creditors shall be paid by Castel and wife and Mitchell.

SUPREME COURT

—

WRIT OF PROHIBITION,—IRREGULARITY OF PROCEEDINGS OF INFERIOR COURT NOT A GROUND FOR PROHITION—EXCESS OF JURISDICTION.

Held that mere irregularity in the proceedings in the Inferior Court would not of itself be regarded as a sufficient ground for the issue of a writ of prohibition, unless the irregularity amounted to an excess of jurisdiction;

That the District Magistrate in giving to the Usher of the Supreme Court the order to pay into the District Court the moneys held by him in virtue of a judgment of the Supreme Court had exceeded his jurisdiction, and that that order indicated that he was about further to exceed his jurisdiction;

The Court accordingly made absolute the Rule Nisi already issued, and prohibited further proceedings before the District Court.

Costs to the Applicants.

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GOPAUL AND ANOTHER,—Applicants

versus

EDOO,—Respondent

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Before

His Honor A. G. ELLIS,—Acting First Puisne Judge

and

His Honor E. J. LECLEZIO,—Acting Second Puisne Judge

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W. NEWTON,—Of Counsel for Applicants
A. BÉTUEL,—Attorney for the same

H. GALÉA,—Of Counsel for Respondent
L. WOHRNITZ,—Attorney for the same

Record No. 20,226.

17*th April* 1879

When this case was formerly before the Court a Rule *Nisi* was granted calling upon the Respondent to shew cause why a writ of prohibition should not issue ordering that no

further proceedings be had in this cause. In opposing the motion that the Rule be made absolute, the Respondent now contended in the first place that the proceedings before the District Magistrate were quite regular, and in the second place that even if the steps taken by the Respondent were not in all respects regular, there had been no encroachment by the District Magistrate upon the jurisdiction of this Court.

With regard to the first point, it appears to be clearly laid down by the authorities that mere irregularity in the proceedings below will not of itself be regarded as a sufficient ground for the issue of a writ of prohibition, unless the irregularity has amounted to an excess of jurisdiction. Such a writ will, as a general rule, only issue when the Inferior Court has exceeded or is evidently about to exceed its jurisdiction. For the purposes of this case, therefore, it seems unnecessary to consider whether, in proceedings such as the present, the procedure before the District Court, when that Court exercises the jurisdiction vested in it, is to be regulated by the Rules of practice framed under the District Court Ordinance or by the provisions of the Code of Civil Procedure. The sole question to which we must direct our attention is whether it is plain that the Inferior Court has exceeded or is about to exceed its jurisdiction.

It was admitted by the Respondent that, if the learned Magistrate had proceeded to order the distribution of the moneys in the hands of the second applicant, which form the proceeds of the sale under the *saisie execution* granted by this Court in favor of the first applicant, he would thereby have encroached upon the jurisdiction of the Court, and a writ of prohibition might competently have been craved. He contended however, that nothing tantamount to this had occurred, the only steps taken being to validate the attachment lodged at the instance of the Respondent, and to order the payment of the moneys held by the second applicant into the hands of the Clerk of the District Court. But, can it be said that in ordering the payment of the proceeds to the Clerk of his Court the District Magistrate has not already trespassed upon the jurisdiction of this Court, and is that order not a clear indication that unless hindered the learned Magistrate is about further to encroach upon the jurisdiction of the Court? It appears to us that these questions cannot but be answered in the affirmative. The moneys in the hands of the Usher, the second applicant here, were moneys which came into his hands in virtue of a judgment of this Court, and which were held by him as an officer of the Court, and to be disposed of in accordance with its orders. When however, in such circumstances, a summons is issued by an Inferior Court, under which the Usher is called before it, is examined touching those very sums, and is ultimately ordered to surrender them into the custody of an officer of the Inferior Court, can it be for a moment doubted that these proceedings and that order are an encroachment upon the jurisdiction of this Court? Under a judgment of this Court moneys come into the hands of its own officer to await its disposal, if the District Court intervene and order the payment of moneys so held to *its* officer, it thereby encroaches upon the authority of this Court by depriving its officer of the custody of these funds. It was suggested that by this order the District Magistrate did not affect the ultimate disposal of the funds, which would still fall to be distributed by the Master of the Supreme Court; but, if the Magistrate did not intend to apportion the money among those whom be deemed entitled to it—why did he interfere to deprive the officer of this Court of its custody, and to place it in the hands of his own officer? It cannot, we think, be doubted that the order in virtue of which the money was paid into the hands of the District Clerk was merely preliminary to steps being taken by the learned Magistrate for the distribution and apportionment of the sum among those whom be should find entitled to it. On any other supposition the order transferring the custody of the money to the hands of an officer of the District Court appears inexplicable.

We are therefore of opinion that the learned Magistrate has exceeded, and that the order pronounced by him indicates that he is about further to exceed, his jurisdiction, and we shall accordingly make absolute the Rule Nisi already issued and prohibit further proceedings before the District Court in this matter, and further find the applicants entitled to the costs of the proceedings in this Court against the Respondent Edoo.

BAIL COURT

ACTION IN PAYMENT OF $ 500 AMOUNT OF UNPAID INSTALMENTS OF CERTAIN SHARES OF AN ANONYMOUS COMPANY,—TITLE OF PLAINTIFF TO SUE.

In this case the Plaintiff as liquidator of the Anonymous Company known as the "Crédit

Foncier de l'Ile Maurice" claimed from the Defendant, holder of 25 shares of the Company the sum of $ 500 *being the last instalment due by him on the price of his shares.*

The Defendant, while admitting that the instalment claimed was still unpaid, and that a call for it had been duly made and published, pleaded that the Plaintiff's appointment as liquidator of the "Crédit Foncier de l'Ile Maurice" had not been made in conformity with the statutes of the Company, and that therefore, he had no right to sue.

Held that on a sound contruction of the statutes of the Company, in as much as no General Assembly of the Shareholders had been convened between April 1869 *and October* 1876, *the Directors who held office at the latter date being still a quorum, could competently convoke a General Assembly and submit to it the expediency of dissolving the Society and appointing a liquidator;*

That the Assembly, as was shewn by the Minutes of the Society, by the required majority had appointed the Plaintiff liquidator and empowered him to sue; That therefore he had been regularly appointed liquidator and had a right to sue.

The Court accordingly repelled the Defendant's objections and gave judgment against him with costs.

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FERDINAND DUPONT,—Plaintiff
(Liquidator of the Credit Foncier de Maurice)

versus

FRANÇOIS JOSEPH BOUR,—Defendant

—

Before

His Honor A. G. ELLIS,—Acting First Puisne Judge

—

G. GUIBERT,—Of Counsel for Plaintiff
J. GUIBERT,—Attorney for the same

L. ROUILLARD,—Of Counsel for Defendant
V. G. DUCRAY,—Attorney for the same

Record No. 6453

25th April 1879

In this action the Plaintiff as liquidator of of the Anonymous Company known as the "Crédit Foncier de l'Ile Maurice", craves judgment against the Defendant as holder of twenty five of the Company's shares, ordering him to pay over to the Oriental Bank Corporation on account of the Master of the Supreme Court to await the orders of the Court, the sum of $ 500—being the unpaid balance of the price of the said shares together with interest thereon for five years at 9 per cent. The Supreme Court has already had occasion to deal with a claim of a similar nature at the instance of the Plaintiff acting in the same character. In that case, *Dupont versus Galdemar frères*, exception was taken to the regularity of the proceedings by which the Plaintiff was appointed liquidator of the Company. Amongst other pleas then urged by the Defendants in support of the exception to the Plaintiff's title to sue, it was contended that at the date of the general meeting at which the Plaintiff was appointed liquidator, the appointments of the Directors of the Company had lapsed, and that consequently there was then no Board of Directors which, under the Statutes of the Company, was entitled to summon a general meeting of the shareholders, or to bring the question of the appointment of a liquidator before such meeting. In answer to this plea, the Plaintiff alleged that the Defendants had taken part in the Meeting and Proceedings of the Board relative to the convocation of the General Meeting and could not therefore maintain this objection. By a judgment dated 23rd May 1877. (Sauzier's Reports 1877 page 73) the Court after repelling several of the grounds upon which the Plaintiff's title to sue was challenged, before dealing with that just referred to allowed the Plaintiff to lead evidence in support of the alleged bar. On the case coming again before the Court, evidence was led, and, after hearing parties on the merits, the Court (20th February 1878 Sauzier page 8) gave judgment in favor of the Plaintiff, and further ordered "that the monies due under this judgment "and in similar cases, where the parties are "ready to pay, be paid over to the Oriental "Bank on account of the Master of this "Court, to whom the Bank receipt will be "delivered, to wait the orders of the Court."

It was admitted by the Defendant here that he held twenty five shares in the Company, and it was not denied that the last instalment of the price of these shares was still unpaid, and that a call for the instalment had been duly made and published.

The Plaintiff urged that in the circumstances the Defendant had no interest to oppose the demand made upon him. The order sought was in conformity with the direction to pay the amount of the unpaid instalments to the

Oriental Bank Corporation on account of the Master, and to await the orders of the Court, and such payment would undoubtedly operate a valid discharge in the Defendant's favor of an obligation the existence of which he did not call in question.

The Defendant in reply contended that the direction of the Court in the case of Galdemar Frères could not be pleaded by him in answer to a claim for the instalment due on the shares held by him, at the instance of the Assignee in Bankruptcy of the Company or of any other person legally entitled to sue therefor in as much as that direction was strictly limited to the case in which it was pronounced, and similar cases, and could not cover the demand against the present Defendant who stood in a different position from the Defendants in the previous action, and that accordingly he had an interest to oppose the Plaintiff's demand.

After carefully considering the judgment of 20th February 1878, I am unable to hold that the order then made can exclude the Defendant here from questioning the Plaintiff's right to insist in this action. It would rather appear from the terms of that judgment that the preliminary objections originally urged by the Defendants were not insisted in, and that the Court dealt solely with the merits of the action. But, however this may be, the Direction appended to that judgment was carefully qualified so as merely to be applicable to that and any similar cases. The present action however differs from Galdemar's case in this important particular that here it is not contended that the Defendant is barred from insisting in his objection to the Plaintiff's title to sue.

We must therefore proceed to examine the grounds upon which the exception taken by the Defendant rests. In 1869 the affairs of the Society were seriously embarrassed, and on the 7th of April of that year a General Assembly of the shareholders was held, at which a motion for the Dissolution and Liquidation of the Society under Article 88 of its Statutes was proposed. It was not disputed that the circumstances were such as would have warranted the Meeting in adopting the course suggested. The proposition was rejected however, and after discussion an amendment was almost unanimously adopted by which it was resolved that the Liquidation of the Society should be carried out by the Directors whose mandate was maintained, and further that the necessary authority should be obtained from Government for reducing the quorum of Directors for the purposes of their Meetings from 7 to 3. It was argued by the Defendant that the requisite steps for giving effect to the latter part of this resolution were not timeously taken, but, after examining the point, I am of opinion that this objection cannot now be sustained.

Subsequent to April 1869, it would appear, that, tho' the statutes require that there should be at least two General Assemblies of Shareholders held in each year, such assemblies ceased to be convened. It was not suggested that in failing to call the shareholders together the Directors were actuated by any improper motives. It would appear that assemblies were not held because the Directors considered that there was no necessity for such assemblies, their action being confined to proceedings with the view of realising the assets, and carrying out the Liquidation of the Society. Perhaps also, the failure to call the shareholders together may be ascribed in part to the construction put by the Directors upon the clause in the resolution of 7th April 1869 by which it is declared that " the mandate " of the Directors shall be maintained." But, from whatever cause it arose, there is little doubt that any shareholder disapproving of the course adopted by the Directors, and desiring to have a General Assembly convoked might have induced or compelled the Board to accede to his wish. No action was taken by any one until in the course of 1876 some difficulty was experienced by the Directors in endeavouring to enforce a call upon a shareholder. Early in October a Meeting of the Directors was held at which it was resolved to convene a General Assembly of the Shareholders. A notice was accordingly inserted in the Newspapers, by the order of the Directors, convoking a General Assembly of the Shareholders for the purpose of deliberating and determining on the liquidation of the Company, regulating the mode of liquidation and appointing one or more liquidators. At this Meeting held on 26th October, the majority of the shareholders required by the statutes resolved that the Company should be put in liquidation, and the Plaintiff was appointed liquidator with the powers necessary to carry out the liquidation. It is in virtue of this appointment that the Plaintiff now sues and seeks to enforce against the Defendant, as a shareholder in the Company the duly made call for the final instalment of one fifth of the price of the shares held by him.

In reply to this demand, the Defendant challenged the Plaintiff's appointment as liquidator, as not having been made in conformity with the Statutes of the Company. In support of this pretention it was contended that under the Statutes, General Assemblies

of the Shareholders could only be convoked by the Board of Directors and resolutions regulating the mode of liquidation, and appointing liquidators could only be entertained by such assemblies upon the proposition of the said Board, and that at the date of the pretended appointment of the Plaintiff as liquidator there no longer existed any persons entitled to act as Directors—the Board as constituted in 1869 having by efflux of time become *functus officio*.

This contention is based upon Articles 18 and 19 of the Statutes of the Company which are as follows: "Art. 18. Le Conseil des "Directeurs se compose de quinze Membres."

"Art. 19. Les Directeurs sont nommés par "l'Assemblée Générale des Actionnaires. Ils "se renouvellent par cinquième chaque année. "Les membres sortant sont désignés par le "sort pour les quatre premières années, en- "suite, par l'ordre d'ancienneté. La réélection "des membres sortant ne peut avoir lieu "qu'après une année révolue."

The question therefore which arises for consideration is whether on a sound construction of these Articles, the Board of Directors as constituted in 1869, had in 1876 ceased to exist, and were no longer competent to convoke a General Assembly of the Shareholders of the Company, and to submit to such Assembly propositions relative to the affairs of the Company.

It is undoubted that the intention of the framers of these statutes was that every year three Members of the Board should retire, and be replaced by three new Directors appointed by the General Assembly of the Shareholders, so that every five years the entire Board of Directors should be renewed. In conformity with this Rule, the Minutes of the General Assemblies of the Shareholders, show that up to 1868—three Directors were nominated to replace the retiring Directors, at one of the two Assemblies of Shareholders held every year in compliance with Art. 38 of the Statutes. In 1869 however only one assembly was held and thereafter no assembly of the shareholders took place until 1876. In these circumstances are we to hold that, in virtue of the Articles above cited, each year the three senior Members of the Board of Directors *ipso facto* became *functi officio* until the whole Board became extinct, and that thus, long before 1876, the whole machinery of the Company was thrown out of gear, and it became impossible to carry on or to wind up the affairs of the Society? This is a construction of the statutes of the Society which will not readily be adopted, as it cannot be supposed that such was the meaning of the founders of the Company in framing them. But further, I do not think that this is the necessary result of the terms of the Articles referred to. The leading idea in the rules cited is that contained in Article 18 which provides that the Board shall be composed of 15 members. Then Article 19 provides for the nomination and *renewing* of the Board. According to the rules the appointment of Directors and consequently any action for the "renouvellement" of the Board must proceed from the General Assembly. In conformity with this idea the language employed in Article 19 does not seem to point to three members of the Board ceasing *ipso facto* to be Directors, so that if no assembly were convoked within the year the Board would cease to be composed of 15 Members, but rather to the three new Directors annually elected by the assembly taking over the functions of the three senior Members on the Board. The words "ils se renouvellent" suggest the idea of the change in the constitution of the Board being the result of the appointment of new Directors, and taking place concurrently with and as the result of that appointment-not that of the three senior Directors bee coming each year *functi officio*, irrespective of any elections being made by the General Assembly.

An examinatiou of the Minute Books of this Society will show that the view just indicated of the sound construction of this rule is that which was acted upon by the Company. During the first four years of the existence of the Society, the rule as we have seen provides that the outgoing Directors shall be chosen by lot, and thereafter by seniority. Now if this rule had been understood to enact that the mere lapse of time disqualified Directors, we should have expected to find that within the year steps would have been taken to determine by lot which Members of the Board were each year to retire, and to provide for their being replaced at the Board. But this was not done. The first Meeting of the Society was held on the 17th and 18th March 1864, and according to the contention of the Defendant, on 18th March 1865 the functions of three of the Directors then appointed lapsed. We should therefore have expected either that a general assembly would have been convened to fix by lot which three Members of the Board had become *functi officio* and to replace them, or that the names of the outgoing Directors would have been determined at a Meeting of the Board of Directors, and provisional appointments, to the vacancies so occasioned made by the Board.

A reference to the Minute Books however shows that neither of these courses were

adopted, and that it was only at the General Assembly of 5th August 1865 that steps were taken to determine the names of the outgoing Directors, and to replace them. During the period from March to August the Board of Directors continued to hold its meetings and at those meetings several of the outgoing Directors for that year (as ultimately determined by lot) were present and acted. The same observations may be made with regard to the following years. From this I gather that Art. 19 of the Statutes was, by the Society itself, interpreted in accordance with what I have indicated as being in my opinion the only sound construction namely, not as enacting that three Directors shall annually and *ipso facto* become disqualified, but as providing that the Directorate shall be renewed by the shareholders nominating annually three persons to take over the functions of the three senior Members of the Board.

Viewing this as the sound construction of this Rule, it follows, that, so long as no general assembly was convoked by the Directors, voluntarily or on the initiative of one or more shareholders, the process of "renewing" was suspended and the Board remained unchanged—the members holding office at the last general assembly continuing vested with the powers and duties of Directors. As therefore no general assembly was convened between April 1869 and October 1876, I hold that at the latter date the survivors of the Directors who held office at the former date being still a *quorum* could competently proceed to convoke a general assembly, and to submit to it, as the minutes of that assembly show they did, the question of the expediency of dissolving the Society and of appointing a liquidator. On the proposition having been submitted to it, the assembly, by the required majority, appointed the Plaintiff and empowered him to sue on behalf of the Society. I must accordingly repel the objections urged by the Defendant to the Plaintiff's title as liquidator, and give judgment in favor of the Plaintiff as craved with costs.

BAIL COURT

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CLAIM OF $ 323,—VALUE OF MATTER AT ISSUE,—INTEREST OF PARTIES,—JURISDICTION OF BAIL COURT.

In this case the Plaintiff as holder of a claim of $ 323 due by the heirs of A. Garien, the late brother of Mrs Hulm, one of the Defendants, caused an attachment to be lodged in the hands of these latter against all sums due by Mrs Hulm to the heirs of A. Garien. The Plaintiff alleged that Mrs Hulm had purchased from her brother and sisters an immoveable property belonging to her and to them as together entitled to the succession of their mother; That by the deed of sale it was declared that Mrs Hulm had not paid a portion of the sale price viz: $ 1232, which was to be dealt with in a particular way and that consequently a portion of that sum was due by Mrs Hulm to the succession of her brother A. Garien; as a creditor of this latter, the Plaintiff further contended that the attachment lodged by him in the Defendants' hands affected this amount, and that he was entitled to a judgment against them.

The Defendant Mrs Hulm averred in her affirmative declaration that no portion of the $ 1232 was due by her to the heirs of A. Garien.

In these circumstances the Defendants objected to the jurisdiction of the Bail Court on the ground that as the real matter at issue was the liability of Mrs Hulm to pay to the succession of her mother the balance of $ 1232 mentioned in the deed of sale, the action exceeded £ 100.

Held by the Court that quoad *the Defendants the matter at issue was whether in a question with certain heirs the rights of the representatives of one of whom as his creditor the Plaintiff exercised, the Defendants were indebted in the sum of $ 1232 and that accordingly the subject of litigation exceeded the amount to which the jurisdiction of the Bail Court was limited.*

The Court therefore dismissed the action.

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HENRI COURTOIS,—Plaintiff

versus

HENRI HULM & WIFE,—Defendants

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Before

His Honor A. G. ELLIS,—Acting First Puisne Judge

L. A. THIBAUD,—Of Counsel for Plaintiff
A. ROHAN,—Attorney for the same

E. GALLET,—Of Counsel for Defendants
T. NICOLAS,—Attorney for the same

Record No. 6,428

25th April 1879

In this case the Plaintiff is the holder of a claim of $ 323 due by the heirs of the late Aristide Garien, also known by the name of Garien aîné. With the view of recovering payment of this claim, the Plaintiff on the 22nd December 1876 lodged in the hands of the Defendants an attachment against all sums due by Mrs Hulm to the heirs of Garien ainé. The said attachment was validated by the Court on 29th May 1877, and by a Rule of Court dated 20th July in the same year the Defendants were ordered to file an affirmative declaration of all moneys due by them to the Plaintiff's debtors. In the present action the Plaintiff on the allegation that the affirmative declaration filed by the Defendants in compliance with the said Rule was incomplete and inexact, called upon the Defendants to show cause why they should not be condemned to pay to the Plaintiff the sum of $323 due by them to the debtors of the Plaintiff.

The essential facts of the case are as follows. The Defendant Mrs Hulm is the Sister of Garien ainé, and on 9th July 1860 purchased from her Brothers and Sisters an immoveable property belonging to her and to them as together entitled to the succession of their mother. By the deed of sale it is declared that a portion of the price amounting to $ 1232 was not paid by Mrs Hulm, but was to be dealt with in a particular way. The Plaintiff now alleged that this sum was due by Mrs Hulm to the heirs of her mother, Mrs Garien, and that a portion thereof was consequently due to the succession of Garien ainé as one of those heirs, and as a creditor of Garien ainé he contended that the attachment lodged by him in the Defendant's hands, affected this amount, and that he was entitled to a decree condemning the Defendants to pay it to him. In her affirmative declaration the Defendant, Mrs Hulm, averred that no portion of the sum of $ 1232 mentioned in the deed of sale was due by her to the succession of Widow Garien, or to the heirs of Garien aîné as entitled to a portion of that succession.

In these circumstances the Defendants objected to the jurisdiction of the Bail Court, contending that as the question at issue really was the liability of Mrs Hulm to pay to the succession of Widow Garien the balance of $ 1232 mentioned in the deed of sale—the action was not, in terms of Article 3 of the Royal Order in Council of 23rd October 1851, one of those "small causes," that it is to say, suits and demands wherein the subject "of litigation shall not exceed £ 100"—to which the jurisdiction of the Bail Court is restricted.

In determining what is the subject in litigation *quoad* the Defendants in the sense of this enactment it was submitted that regard must be had to the extent of their interest. It might be true that so far as the Plaintiff was concerned, the amount which he could recover under the action was under £ 100. But that was not necessarily the measure of the Defendants' interest. As regards them the decision of the Court would have a much more extensive effect. The Plaintiff insisted in the suit as one of the heirs of Garien ainé, and sought to have it determined that these heirs as representatives of Mrs Widow Garien, were entitled to payment from the Defendants of a sum of $ 1232 under the deed of sale in her favor. Any judgment which could be arrived at in the Plaintiff's favor could only proceed upon the footing of finding the Defendants in a question with the heirs of Widow Garien liable in payment of the sum mentioned, and founding on this judgment any creditor of the heirs Garien might attach in their hands the balance of the said sum remaining due after payment of the Plaintiff's claim. In support of their contention the Defendants founded upon the cases of *Macfarlane versus Leclaire* decided by Her Majesty's Privy Council (Moore's Reports Vol. 15 N. S. page 181 and of *Awaye versus Martin* decided by this Court (Piston Vol. 17 page 153).

After careful consideration I am of opinion that this objection is a sound one, and that *quoad* the Defendants here the real question is whether in a question with certain heirs, the rights of the representatives of one of whom, as his creditor, the Plaintiff exercises, the Defendants are indebted in the sum of $ 1232—and that accordingly the subject of litigation exceeds the amount to which the jurisdiction of the Bail Court is limited.

The Plaintiff contended that the objection to the jurisdiction of the Court was not taken within the limited delay allowed by Rule of Court (small rules) 168, and could not therefore be sustained. I cannot however hold that the effect of that Rule is to give the Court jurisdiction in matters without its jurisdiction—if the objection be not taken within the delay mentioned.

I think however, that I should not be acting within the spirit of that Rule were I not, in dealing with costs, to take into account the delay which has occurred here in objecting to the jurisdiction of the Court. I shall accordingly dismiss the action and find the Defendants entitled to their costs merely from 9th May 1877 and find them, on the other hand, liable to the Plaintiff in costs incurred by him in connection with this action between the 3rd day of February, being the day before the return day of the summons in this action, and the 9th of May 1877 being the date at which the objection to the jurisdiction of this Court was intimated by the Defendants to the Plaintiff.

BAIL COURT

APPEAL FROM JUDGMENT OF DISTRICT JUDGE OF SEYCHELLES, — SURVEY OF LAND,— NON FULFILMENT OF REQUISITES OF ORDINANCE 33 OF 1867 ART. VIII,—REMIT OF CASE TO COURT BELOW.

Held by the Court that the Survey made by Land Surveyor Butler and put in evidence before the Court below was null and void for non compliance with the requisites of Article VIII of Ordinance 33 of 1867.

The Court therefore remitted back the case to the District Court of Seychelles to put matters in a proper shape, so as to enable the appellate jurisdiction to entertain the appeal on the merits.—Costs reserved.

BARRAUT & WIFE,—Appellants

versus

CHAMPAGNE,—Respondent

Before

His Honor N. G. BESTEL,—Acting Chief Judge

L. ROUILLARD,—Of Counsel for Appellants
T. HERCHENRODER,—Attorney for the same

H. GALÉA,—Of Counsel for Respondent
G. KŒNIG,—Attorney for the same

Record No. 697

28th April 1879

This was an appeal from a judgment given by the District Judge of the Seychelles Islands ordering land Surveyor Butler to go on the land in the plaint mentioned and in question before the District Court, and draw a line so as to set apart the $\frac{8}{100}$ of an acre of land surplus on four acres, and the line to be drawn by the said Surveyor to be the boundary line of Plaintiff and Defendants on the contested spot which will give to Plaintiff the land she claimed and " as to damages I believe, says the District Judge, that if the Plaintiff recover Rs 20 from Defendant it will meet the exigencies of the case. I do order that Barraut do pay to Plaintiff Rs 20 as damages with costs against Barraut. As to Mrs Barraut she is put out of cause but only with costs of disbursement. Chambers District Court Seychelles 19th August 1878. (Signed) E. de Lapeyre District Judge."

Before going further, I must say that in copying this part of the District Judge's judgment I was struck at finding that the District Judge had given in Chambers a judgment which should have been pronounced on the Bench, without recording the presence of parties at Chambers and their consent to this unusual mode of proceeding. However, Counsel not having complained of the District Judge's decision on that ground I shall say nothing more as to the illegality of such a mode of proceeding. What I have said on this head will, I trust, be a warning to the Court below not to repeat the same irregularity in future.

The reasons of appeal are very numerous indeed. But the learned Counsel who argued before the appellate jurisdiction restricted their argument to this single proposition. How far was this appeal competent? The incompetency of the appeal urged by *Galéa*, for the Respondent, rested upon the amount of a portion of land of two acres in dispute not coming up to an appealable amount, and that the value of that portion of land should have been established otherwise than upon affidavit.

Rouillard insisted upon the propriety of such appeal and quoted the proceedings to have been adopted by the Supreme Court in the case of *Ollier versus Currie*. I have referred to the case quoted, but have been unable to find in the report of this case any reference to any affidavit filed as to the amount of any of the Defendants' personal interest in the aggregate amount; it is therein merely said: The largest possible interest, if any, of the parties here wishing to appeal is only £ 150.

No allusion is made to the appointment of Mr Gondreville nor of any report on his part touching the value of the matter in dispute.

Be this as it may, the District Judge ordered by the judgment under appeal one Butler to draw a line which should hereafter be the boundary line between the two Estates, without adding that the drawing of such line should take place in presence of parties duly called. This is one of the grounds of appeal which deserves attention and involves the fate of this appeal if supported by evidence in the record. 1o. On the *26th April* 1876 Théodore Butler was called upon by Célina Champagne to measure a piece of land at the Morne belonging to her, found by the Surveyor to amount to 4 acres and $\frac{8}{100}$; none of the neighbouring owners of land were present nor called to attend such survey.

On the *29th August* 1878 the same Land Surveyor T. Butler carried out the Judge's order of the 19th August 1878. He went on the estate, withdrew from Champagne's piece of land the $\frac{8}{100}$ of an acre included in the four acres belonging to Célina Champagne. Neither Célina Champagne nor the neighbouring owners were called to attend the survey by Butler.

2o. On the *23rd July* 1878 in compliance with another order of the District Judge without date being mentioned in the Memorandum of Survey, the same Land Surveyor proceeded to the survey and verification of the limits of a plot of land belonging to Mrs Célina Champagne according to her title deeds. He concludes his memorandum of survey by telling us that he *read it to no one*, and that he forwarded the same to the District Judge.

A strange state of things this. The District Judge orders a thing to be done which may affect more or less materially the interest of one of the parties in a suit without ordering service of such order upon the absent parties in order to enable them to attend such survey if so minded.

The land Surveyor thirdly carrying out the Judge's order as if there were no law opposing such exparte survey on his part. Indeed the land Surveyor seems to be priding himself upon fulfilling none of the requisites of the law, by taking special care to inform us that he had read his memorandum of survey to no one. Had he gone to the trouble of reading Ordinance 33 of 1867 and the prohibition found in Art. VIII of the same Ordinance to this effect that no sworn land Surveyor shall survey any estate or portion of land whether for the purpose of fixing the *boundaries* of the same or for any other purpose, unless the proprietors of the bordering estates or land shall be present at such survey and have been duly called to be present &c." he would not have proceeded as he has done in spite of the Judge's order. I must also for his own sake call upon him to look at the penalties enacted in Article XII of the same Ordinance which declares " that a breach of any of the provisions contained in the four last preceeding Articles shall render the memorandum of survey null and void and shall subject the land Surveyor drawing up the same to a penalty not less than £ 10 and not exceeding £50 " ; that the Ordinance is applicable to Seychelles can suffer no doubt on reference to Art. 24 of the said Ordinance No. 33 of 1867.

I shall say nothing as to the incompetency of this appeal, because of its coming short or not of the appealable amount, but resting my judgment on the tenth ground of appeal, I can and must declare the survey put in evidence null and void for non compliance with the requisites of the Ordinance above mentioned and before giving any judgment on the merits of the present appeal, this case is hereby remitted to the District Court of Seychelles for putting matters in a proper shape to enable the appellate jurisdiction to entertain this appeal on the merits. Costs reserved and to be disposed of with the merits.

BAIL COURT

ACTION IN DAMAGES,—LEASE,—TROUBLE DE DROIT,—TENANT'S REMEDY,— PRELIMINARY OBJECTION TO THE ACTION.

In this case the Plaintiff claimed a Thousand Rupees as damages from the Defendant because this latter had caused to be cut down and carried away certain sugar canes, the Plaintiff's property, then and there growing on two plots of ground leased by the said Plaintiff from a neighbouring proprietor as evidenced by two deeds under private signatures of the 24th April 1878.

The Defendant while not denying the cutting down and the carrying away of the canes, urged as a preliminary objection that, as lessee of the pieces of land above mentioned, the Plaintiff had no right of action against him, as he (the Defendant) laid claim to the ownership of the land leased ; and that

the Plaintiff's remedy in such a case was to denounce the "trouble de droit" to his lessor so as to allow him to protect his right of ownership as against the author of such trouble saving his right of action against his lessor for any damage sustained by him through the lessor's inability to protect the tenant.

Held by the Court that the action had been rightly and competently brought in as much as the Plaintiff did not ask for damages as lessee of the two pieces of ground, but as owner of the canes cut down and carried away by the Defendant; the lease having been mentioned in the plaint not as binding upon the Defendant, but merely for the purpose of setting out with greater certainty the locus in quo *on which the canes were growing.*

The Court therefore overruled the Defendant's preliminary objection and ordered the case to be proceeded with on the merits reserving all question of costs.

—

CHÉRI MARISSON,—Plaintiff

versus

SAMUEL WILSON,—Defendant

—

Before

His Honor N. G. BESTEL,—Acting Chief Judge

—

T. L. JENKINS,—Of Counsel for Plaintiff
G. BOULOUX,—Attorney for the same

W. NEWTON,—Of Counsel for Defendant
A. PITOT,—Attorney for the same

Record No. 6,468

28th April 1879

The Plaintiff in this case complains against Wilson for that on the 5th August 1878 the Defendant by means of a gang of indians with Sirdars and overseers under the Defendant's control caused to be cut down and carried away certain sugar canes the Plaintiff's property then and there growing, and being on a piece of land of one acre in extent which he holds on lease from James Widdrington Shand as evidenced by an act under private signatures of the 24th April 1878 duly registered.

The Plaintiff complains also against the Defendant for having on the day and year aforesaid in the same manner and by the same means caused the cutting down and the carrying away of certain sugar canes the property of the Plaintiff then and there growing and being on another piece of land of half an acre in extent leased in like manner from the said Shand by the act under private signatures of the date aforesaid duly registered.

Wherefore an action, says the Plaintiff, hath accrued to him to demand of the Court here that the said Defendant be condemned to pay to him the sum of Rs 1000 for the wrongs alleged to have been by him sustained from the cutting and carrying away of the sugar canes growing and being on the two parcels of land so leased by him as above mentioned. *Newton* of Counsel for the Defendant Wilson urged as a preliminary objection. 1o. That as *lessee* of the pieces of land above mentioned, the Plaintiff had no right of action against Wilson who lays claim to the ownership of the land. The lessee's remedy in such a case is to denounce the "trouble de droit" to the lessor so as to allow him to protect his rights of ownership as against the author of such trouble, saving his right of action against his lessor for any damage sustained by him through the lessor's inability to protect the tenant.

This case is provided for by Articles 1726 and 1727 C.C. (vide Troplong) Echange and Louage Vol. I page 368—Vide same Writer same Vol. page 380 § 273 and 274.

But in the case of a mere trouble *de fait* the lessee' sremedy is by an action directed by him personally against the wrong doer for any wrong he may have suffered at the hands of the wrong doer and the lessor by Article 1725 C.C. is relieved from all responsability upon such *trouble de fait* (Troplong same work page 370 § 256 on Art. 1725 C.C. (vide also Marcadé V. 6 page 458 No. 2 on Art. 1725 C.C.)

True it was said by *Newton* that the Plaintiff in this case has directed his action against the Defendant Wilson not because of the wrong he has sustained from the cutting and carrying away of his canes to Wilson's mill merely, but as lessee of a third party he had rested his demand against Wilson as such lessee. Wilson does not dispute the fact of his having cut down and carried away the Plaintiff's canes, but his answer to the lessee is *feci, sed jure feci.* Upon that allegation of Wilson, the lessee must necessarily disappear to make room for his lessor to settle with Wilson the disputed ownership between them

as best they can (See Troplong—same work Art. 1,727 page 281 No. 274.)

The Plaintiff might have brought his action and demand damages against Wilson as upon a *quasi delictum* Art. 1382 C.C. That action might have been competent. But he preferred to stand upon his lease and must necessarily fall for the reasons above stated.

Jenkins in answer contended that the action had been rightly and competently brought. The Plaintiff does not ask for damages as lessee, but as owner of the canes cut and carried away by Wilson. Whether the land be Wilson's land or not has nothing to do in the case; the Plaintiff lays no claim to the land, but to the canes which he had planted with his monies. The Plaintiff has suffered a great loss for which he claims to be indemnified, not by the owner of the land whosoever he may be, but by the wrong doer.

Before cutting and carrying away the Plaintiff's canes Wilson might have given him notice of the land being his and not Shand's. Wilson might have challenged the ownership of Shand of the plot of ground leased by the latter to Plaintiff. He has given the preference to a trespass for the assertion of his alleged ownership. He must therefore abide the results of his violent proceedings.

JUDGMENT

It appears to me that the lease mentioned in this action has found its way into the demand not for the purpose of resting Plaintiff's case upon the fact of the lease in no wise binding upon Wilson, but as a matter of description merely for the purpose of setting out with greater certainty the *locus in quo* on which the canes were growing and the place where they had been cut down and whence they had been removed by Wilson. This statement of the leasing of the *locus in quo* therefore may be looked upon merely as an assertion of the *bona fide* possession by Plaintiff of the land trespassed upon by the Defendant, and should not therefore vitiate the demand.

Is there not, however, a passage in this demand militating against the construction I have put upon the word lessee above mentioned. I find this passage in the demand "wherefore in consequence of your aforesaid unlawful entry and trespass upon Plaintiff's *property*." It may be said here the Plaintiff having stated himself to be the lessee, subsequently styles himself the owner of the properties trespassed upon. May not the word owner of the property allude to the ownership of the plantations and not to the land. If so the apparent inconsistency or contradiction complained of by *Newton* would disappear. But do we not say every day in speaking of a house leased to us—"My house—my premises". These words may well convey to third parties the idea of the speaker being the owner of the house or premises, but would and could not convey the same idea to the owner, the lessor of the property leased. What was Wilson as to the Plaintiff, a third party; an intruder upon the land leased to Plaintiff. How can the fact of Plaintiff being a mere lessee of the land warrant Wilson in entering upon the land so leased, rightly or wrongly by Shand, and cutting and carrying away the canes of Plaintiff.

The demand appears to me sufficiently clear as it is, it might perhaps be rendered less ambiguous by striking out the words, *lease* and *my property* in the declaration. This amendment would not affect the real merits of the case and would and could not embarrass the Defendant in his defence.

I therefore overrule *Newton's* preliminary objection and allow the case to be proceeded with on the merits such at it stands.

Costs of this incident to be disposed of with the merits of the case.

SUPREME COURT

—

RULE NISI,—DISSOLUTION OF PARTNERSHIP.

Held in this case by the Court, discharging the Rule prayed for by the Defendant as premature, that the dissolution of the partnership which had existed between the parties, not having been decreed by the Court, such dissolution could not be assumed as a "fait accompli", in as much as the reasons given by the Plaintiff were denied by the Defendant.

—

ROUHIERE THE WIFE,—Plaintiff

versus

RUSTICHELLI,—Defendant

Before

His Honor N. G. BESTEL,—Acting Chief Judge

and

His Honor A. G. ELLIS,—Acting First Puisne Judge

—

E. PELLEREAU,—Of Counsel for Plaintiff

F. LASTELLE,—Attorney for the same

W. NEWTON,—Of Counsel for Defendant

E. GANACHAUD,—Attorney for the same

Record No. 20,240

30th April 1879

A Rule Nisi was issued in this case on the 22nd April instant calling upon the Defendant to show cause on the 29th of the same month of April why a rule should not be issued authorising an Usher of the Supreme Court to put himself in possession of the stock in trade and material of the partnership made between parties, to inventory and sell the same with costs against the Defendant, to be paid by privilege of the net proceeds of the sale of the stock in trade and material of the said partnership. All rights of Defendant being reserved. The proceedings in this case show the existence of a partnership between Rouhière the wife with the authorisation of her husband and Rustichelli. The pleadings shew their willingness that the above partnership should, though from different causes, be dissolved. Upon the assumption of such dissolution not objected to on either side, *Pellereau* moved as above. *Newton* shewing cause against the rule objected to the rule being made absolute on the ground 1o. That the application of *Pellereau* was premature, inasmuch as there was no judgment as yet decreeing the dissolution prayed for on the one hand and not objected to on the other. That the dissolution was not objected to by his client, yet his reasons for so doing were the very reverse of those stated by the Plaintiff who on her side is anxious to obtain that dissolution for the reasons alleged by her; That such dissolution might not be pronounced by the Court after all. If so the measure proposed by *Pellereau* for the preservation of the rights of parties would be useless. 2o. *Newton* again objected to the appointment of an Usher to inventory and sell the stock in trade, he being not the officer entrusted by law with the performance of the duty which it is sought now to be cast upon him. 3o. That no sufficient reason had been shewn for departing from the Common Law Rule that preference should be given to a partition in kind over a sale by licitation unless such partition in kind were proved to be impossible or likely to be prejudicial to the interest of parties in the cause.

That this proof has not been administered in this case, where upon *Newton* moved for the discharge of the Rule Nisi, with costs. *Pellereau* replied that the respective causes for the dissolution were different it was true, but there was one point of contact upon which parties, were at one (viz.) that the partnership between them should be dissolved that this dissolution though not yet decreed by the Court may safely be considered as pronounced, for it was difficult that the Court should not grant to parties their wish and determination that the partnership should not continue any longer.

Assuming the dissolution to be already decreed, he was warranted in making the application now before the Court. His demand for the appointment of an Usher was made with the view of saving costs. His demand for an immediate sale rested upon the Plaintiff's desire of protecting the " materiel " of the partnership against numberless contingencies. That he had no objection to a partition in kind if possible.

JUDGMENT

Until the dissolution of the partnership has been decreed by the Court it appears to us that we ought not to assume as " à fait accompli " the dissolution demanded by the Plaintiff for reasons denied by the Defendant.

We therefore discharge the rule obtained against the Defendant as premature with costs.

Before

His Honor N. G. BESTEL,—Acting Chief Judge

and

His Honor A. G. ELLIS,—Acting First Puisne Judge

—

E. PELLEREAU,—Of Counsel for Plaintiff

F. LASTELLE,—Attorney for the same

W. NEWTON,—Of Counsel for Defendant

E. GANACHAUD,—Attorney for the same

Record No. 20,240

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That this proof has not been administered in this case, where upon *Newton* moved for the discharge of the Rule Nisi, with costs. *Pellereau* replied that the respective causes for the dissolution were different it was true, but there was one point of contact upon which parties were at one (viz.) that the partnership between them should be dissolved that this dissolution though not yet decreed by the Court may safely be considered as pronounced, for it was difficult that the Court should not grant to parties their wish and determination that the partnership should not continue any longer.

Assuming the dissolution to be already decreed, he was warranted in making the application now before the Court. His demand for the appointment of an Usher was made with the view of saving costs. His demand for an immediate sale rested upon the Plaintiff's desire of protecting the "materiel" of the partnership against numberless contingencies. That he had no objection to a partition in kind if possible.

JUDGMENT

Until the dissolution of the partnership has been decreed by the Court it appears to us that we ought not to assume as "a fait accompli" the dissolution demanded by the Plaintiff for reasons denied by the Defendant.

We therefore discharge the rule obtained against the Defendant as premature with costs.

SUPREME COURT

RIGHT OF WAY, — ENCLAVE, — CANAL, — RIGHT OF SYNDIC THEREOF TO OBJECT TO BRIDGE IT OVER,—ORDINANCE 35 OF 1863.

Held that according to the terms of Ordinance 35 of 1863 regulating canals, a "riverain" through whose land a canal passed, had not the right to bridge it over, or make any operation which might directly or indirectly lead to the obstruction of the course of such canal, or to the defilement of the water flowing therein, without the consent of the other riverains represented by their Syndic;

That in this case, the Syndic of the Villebague Canal having the right to object to any bridge being built over the canal except under conditions to be approved of by him, and keeping in view the heavy expense which, from the nature of the ground, the construction of a bridge across the canal would entail, the Court was of opinion that the Villebague Canal constituted such an obstruction to the Plaintiff's egress from his property, as rendered it "enclavé" on the two sides on which it was bounded by the canal; and that the Plaintiff's property being undoubtedly shut off from communication with the public road on the other two sides, he was entitled to invoke the provisions of Article 682 of the Civil Code, and to obtain from the Defendants, on payment of a proper indemnity, a passage from the land "enclavé" to the highroad.

* AUBIN,—Plaintiff

versus

POTTIER & ORS,—Defendants

Before

His Honor A. G. ELLIS,—Acting First Puisne Judge

and

His Honor E. J. LECLÉZIO,—Acting Second Puisne Judge

G. GUIBERT,—Of Counsel for Plaintiff
F. ROBERT,—Attorney for the same

L. ROUILLARD,—Of Counsel for Defendants
A. ROHAN,—Attorney for the same

Record No. 19,928

15*th May* 1879

This case has already been before the Court, and on the 6th November last, a judgment was pronounced disposing of two out of the three grounds relied on by the Plaintiff in support of his demand. The third pretention advanced by the Plaintiff is, that he is entitled by the effect of law, and on payment of a proper indemnity, to obtain an egress to the public road thro' the Defendants' land, as his own property is cut off on all sides from that road (enclavé), and as the expense of building a Bridge across the Villebague Canal (which forms his boundary on two sides), if he has a right to do so, would be excessive. As the adjudication upon this branch of the action raises an important question relative to canals vizt. whether a canal boundary constitutes an "enclave" or whether a proprietor owning land on either side of a canal is entitled to throw a bridge across it, so as to provide a means of egress from his property on the one side to that on the other, the Court prior to dealing with this part of the case ordered that all the proceedings and papers necessary to bring to the notice of the Syndic of the Villebague Canal the question at issue, should be communicated to him and granted him a delay within which to file, should he be so advised, an answer thereto.

The Syndic of the Canal has filed certain observations, parties have been fully heard upon the matter, and we have now to decide whether property shut off from communication with any public road upon two sides, and bounded on the other sides by a canal, is or is not "enclavé" in the sense of Article 682 of the Civil Code. In the observations filed by the Syndic, he challenges the right of proprietors thro' whose land the canal passes to build a bridge over it without the consent of the riverains, but intimates that he is prepared, under conditions to be fixed by him and the riverains, to allow the Plaintiff to erect a bridge. Now, if the position taken by the Syndic is legally tenable, we are clearly of opinion that the Plaintiff's estate must be regarded as "enclavé" on the sides bounded by the canal, as it certainly is upon the other two sides—for, in that case, he is not in a position to create for himself a mode of egress from his property across the canal except with the consent, and under conditions to be fixed by third parties.

In these circumstances we have carefully considered the provisions of the Ordinance regulating canals, (Ordinance No. 35 of 1863) with the view of determining whether a riverain, thro' whose land a canal passes, has a right to bridge it over, or whether the other riverains and their Syndic have a right to object to any such erection being made. This examination of the law has led us to the con-

* See page 78 of the reports of 1878.

clusion that, altho' the terms used by the Ordinance may leave room for doubt as to whether the riverains are vested with the full right of property above and below the course of the canal, the policy of the law is to entitle the riverains to object to any operations which may directly or indirectly lead to the obstruction of the course of the canal, or to the defilement of the water flowing therein (Articles 41-45). If a riverain may at his own land bridge over a portion of the canal, it would seem difficult to draw a line which would prevent him from covering it in entirely—but such a course would certainly enhance the difficulty of keeping clean the channel of the canal throughout its course, a duty, (Art. 66) which would not lie with him, but would be a burden on the whole riverains. Again such a bridge as is proposed to be erected here for the cultivation of the Plaintiff's land would almost certainly increase the risk of impurities constantly finding their way into the canal. The bridge is mainly intended for the passage of carts conveying away the produce, or bringing to the land manure &c. This would, (unless special precautions were used), almost certainly give rise to impurities finding their way into the canal. For, unless precautions were used and care taken to prevent it, in dry weather the wind, and in wet weather the rain, would carry into the canal the impurities of all kinds lodging upon the roadway.

In these circumstances, we are inclined to recognize the claim made by the Syndic to object to any such erection being made except under conditions—approved of by him—which will constitute adequate safeguards against the risk of the waters of the canal being polluted. As a consequence, and keeping in view the heavy expense which, from the nature of the ground, the construction of a bridge across the canal would entail, we have come to be of opinion that the Villebague canal constitutes such an obstruction to the Plaintiff's egress from his property, as renders it " enclavé " on the two sides on which it is bounded by the said canal, and, it being undoubtedly shut off from communication with the public road on the other two sides, we are of opinion that he is entitled to invoke the provisions of Article 682 of the Civil Code, and to obtain from the Defendants on payment of a proper indemnity, a passage from the land " enclavé " to the highroad.

Before we are in a position to estimate the sum to be paid as indemnity, it is necessary that the course to be followed by the road, its width &c., should be determined. With the view of saving expense to the parties, we shall allow them fifteen days to arrive at an amicable arrangement upon these points, and in the event of their failing to do so, we allow the most diligent party to apply to a Judge in Chambers for an order appointing an expert to go upon the spot, and in conformity with Articles 683 and 684 of the Civil Code to determine the dimensions and mark out the course which the road shall take. On these data being determined amicably or by a duly appointed expert, we further order the cause to be put on the weekly cause list that parties may be heard with reference to the amount of the indemnity payable to the Defendants.

BAIL COURT

—

ACTION IN CANCELLATION OF A SALE, — BANKRUPTCY OF BUYER, — CLAIM OF GOODS BY VENDOR,—FRAUD OF BUYER,— NULLITY OF CONTRACT THEREBY.

Held by the Court that the sale alleged to have been made on the 6th of July 1878 *by Velayoudachetty to Aubagaron was a fictitious and fraudulent transfer of property made with the object of befriending Aubagaron, and was not consequently a bonâ fide transaction under Article* 74 *of Ordinance* 33 *of* 1853.

That the fraudulent intent existing in the mind of Velayoudachetty at the time of the delivery of the oil purchased by him, vitiated the contract entered into between him and the Plaintiffs ; and that therefore such property obtained by him fraudulently could not pass to his assignees upon his bankruptcy, but would still remain the property of the parties defrauded.

The Court accordingly cancelled as null and void the sales made by Plaintiffs to Velayoudachetty aud by this latter to Aubagaron, and validated the provisional seizure made by the Plaintiffs.

—

RICHARDSON & Co.—Plaintiffs

versus

VELAYOUDACHETTY & ORS—Defendants

—

Before

His Honor Mr JUSTICE LECLÉZIO,—Acting Second Puisne Judge

of the Vendee when the transaction took place, as in the case of *Ismael versus Assignees Athing and Aman* 1877 page 120, but was an ordinary case of sale prior to bankruptcy as in that of *Ireland Fraser & Co. versus Emile Louis* 1875 page 102.

It has been said that the delay which elapsed between the sale (22nd June) and the delivery in the present case (5th & 6th July) would tend to show that when the sale took place through a sworn broker, there was no fraudulent intent on the part of the bankrupt; that may be, altho' it is very probable that he was already in embarrassed circumstances, but it cannot be said that when, in order to complete the sale, he applied for the weighing of the goods on the wharf and took delivery of them, the bankrupt was not aware of his state of insolvency and had the intention to pay his vendors; it does not appear from the evidence where the first cask deliverred on the 5th July went, but there is no doubt that on the 6th July he took delivery of the five remaining casks immediately after having had them weighed knowing very well that he was unable to pay his account at the Bank, and that those five casks were going not to his shop, but to that of Aubagaron. The bankrupt thereby obtained on credit from the Plaintiffs goods with intent to defraud them according to the words of Sect. 190 of Ordinance 33 of 1853—and with the view of favouring one of his creditors Aubagaron. It was said on behalf of the Assignees that in the case of *Ismael versus Assignees Atting and Aman* the sale was one for cash, whereas in this case, credit was given to the Vendee. But can that difference as to the mode of payment have any influence on the decision of the Court, if it is satisfied that at the time of the sale and delivery there was an intent in the mind of the Vendee to defraud the vendor? Does not fraud render the contract void, whether the sale is made on credit, or for cash? In the case of *Load versus Greene* 15, Law Journal page 113—(already quoted by Mr Justice Ellis in his judgment in the bankruptcy case of *Athing and Aman* 1877, page 1, and by the Court in the case of *Ismael versus Assignees Athing and Aman*, the sale appears to have been on credit, and that fact does not seem to have had any influence on the decision of the Court.

If vendors were to allow an unreasonable time to elapse after the fraud of the Vendee comes to their knowledge, before instituting proceedings for the recovery of their goods, their silence might be interpreted against them—but can it be said when they sue for the recovery of their goods immediately after the facts of fraud have come to their knowledge, that they had consented to the property passing to the bankrupt and through the bankrupt to the mass of his creditors? Besides this is not a case of reputed ownership of goods found by the Assignees in the possession of the bankrupt.

Here it has been proved that as soon as the Plaintiffs heard that the casks of oil sold by them to the bankrupt had, for the greater part, been fraudulently transferred on the very day of the delivery to the shop of Aubagaron, a creditor for an overdue account of their Vendee, they asked for a provisional seizure and seized four of the casks found in Aubagaron's cellar. I therefore consider that the same principles as those laid down in the case of *Ismael versus Athing and Aman*, apply here, that the fraudulent intent existing in the mind of Velayoudachetty at the time of the weighing and delivery of the oil, vitiates the contract entered into between him and the Plaintiffs, for had the latter had knowledge of the fraudulent circumstances under which the bankrupt obtained delivery of their goods, they would not have given their consent to the completion of the contract of sale entered into on the 22nd June.

I accordingly order that the sales made by Plaintiffs to Velayoudachetty and by this latter to the Defendant Aubagaron, be held as null and void and be cancelled: that the provisional seizure of the four casks of oil found in Aubagaron's cellar be validated, and further that the said Aubagaron do pay to the Plaintiffs the sum of Rs 117.02½—value of the fifth cask of oil declared by him to have been sold to a Chinaman out of the five casks transferred to his shop according to his own admission. I say nothing as to the sixth cask, as it has not been proved that it was sent to Aubagaron's shop by Velayoudachetty. Plaintiffs' costs to be paid by Aubagaron.

BAIL COURT

ACTION IN DAMAGES FOR SHORT DELIVERY OF GOODS, — RESPONSIBILITY OF SHIP-MASTER NOTWITHSTANDING CLAUSE OF "WEIGHT AND CONTENTS UNKNOWN" IN BILL OF LADING.

Held that the Captain, under the circumstances of this case, was not sheltered from responsibility as to the weight of the goods mentioned in the bill of lading signed by him, by the clause "weight and contents unknown" inserted therein;

That the Defendant in this case, although he might have acted with good faith was at fault for having failed to deliver to the Plaintiff in good order and well conditioned a large number of the bags of rice which he had declared in his bill of lading to have received for Plaintiff's account at Bombay in good order and condition ; and that therefore the Plaintiff was entitled to a fair indemnity on account of the state in which part of the cargo consigned to him had been landed.

—

HAJEE SARIFF ISMAEL,—Plaintiff

versus

D. DAVIES,—Defendant

—

Before

His Honor Mr Justice E. J. LECLÉZIO,—Acting Second Puisne Judge

—

L. ROUILLARD,—Of Counsel for Plaintiff
E. LEBLANC,—Attorney for the same

P. L. CHASTELLIER,—Of Counsel for Defen-
E. DUVIVIER,—Attorney for the same [dant

Record No. 6,488

15*th May* 1879

The Plaintiff in this case is a Merchant of Port Louis and sues the Defendant, Master of the ship "Robert Morrison", for the reasons hereunder set forth.

The Defendant signed at Bombay on the 22nd July last year three bills of lading by which he acknowledged having received and shipped on board his ship "Robert Morrison" *in good order and well conditioned* six hundred bags of rice marked as in the said bills of lading specified, to be delivered in the *like good order and well conditioned* into the Port of Mauritius to the Plaintiff or order. The said bills of lading contained the usual addition "*weight and contents unknown.*"

The Plaintiff avers in his plaint that "on the arrival of the said ship "Robert Morrison" into the Port of Mauritius, he, the bearer of the said bills of lading and consignee of the said goods, did fulfill all the formalities and conditions incumbent upon him, as in the said bills of lading stipulated, and pay to the firm Blyth Brothers & Co. Agents in this Colony for the said ship "Robert Morrison", the freight due on the said goods, and applied to the Defendant for the delivery of the said 600 bags of rice, that on taking delivery of the said rice which was then lying on the coasters' wharf, under the shed, he the Plaintiff ascertained and found that a large proportion of the said 600 bags was no more in the good order and condition in which the said goods were shipped and embarked on board the said ship, and that a large quantity of the bags that were being landed was very slack and deficient in quantity and contrary to the bill of lading; that by a notice served on the Defendant on the 22nd October last the Plaintiff warned Defendant of his intention to take delivery of the said rice after having had the same surveyed, examined and weighed, in order to ascertain the difference existing in the said 600 bags of rice for reason of deficiency and slackness, that the said bags were examined at the time specified in the said notice by a competent Surveyor, and many were found very slack, a number resewn and a few patched with pieces of gunny cloth, and that after having been weighed by a sworn weigher, a quantity of 3320 kilograms was found missing in the bags, equal to forty four bags and 20 kilos of rice, each bag of rice usually containing 75 kilograms ; thereby causing a loss to the Plaintiff, through the fault and negligence of the Defendant and the breach by the Defendant of the agreement entered into in the aforesaid bills of lading.

The Plaintiff therefore prays the Court to condemn the Defendant to pay to him the sum of Rs 513.49—being the value of the said 3320 kilog. of rice at the rate of eleven Rupees and 60 cents per 75 kilog. weight of mooghy rice—plus one hundred and thirty nine Rupees and 30 cents for a fine paid by the Plaintiff for breach of the Customs Regulations and costs and other expenses in connection with the aforesaid claim.

The defence was that there was no breach of contract and that there had been no fault or negligence on the part of the Defendant—that the words "weight and contents unknown" inserted in the bills of lading, were so inserted to guard the responsibility of the Master as to any deficiency in the quantity contained in each bag, the bags not being weighed when shipped in India, that if some of the bags were resewn and patched, that was done before landing, in the interest of the consignee, those bags having suffered either from natural decay or from accidental bursting.

Before leaving Mauritius the Defendant had himself and his first and second mate, examined as witnesses before the Master, and they declared that they knew nothing about the weight of the bags, when shipped at Bombay, that the bad state of certain of the bags must have resulted from natural decay or from holes made by vermin or rats, or from accidental bursting, that only five or six bags of sweepings were found in the hold of the ship after the landing of the whole cargo, and that as it was impossible for any one to have access to the cargo during the voyage, no tampering could have taken place; a rummaging certificate was also produced to show that no cargo was left on board the ship, and the Tide Surveyor who signed it was called to prove that no goods not borne on the manifest can be landed without special authority, and it was said that the result of such evidence should be that the deficiency in the weight must have come from the slackness of the bags before they were shipped at Bombay, that the bags of rice came first from Calcutta to Bombay, and before being put on board the "Robert Morrison", must have already suffered to a certain extent.

Witnesses were called on both sides as to the Custom of Trade prevailing both at Bombay in India and in Mauritius as to the usual weight of the bags of rice and the influence of such weight upon the determination of the question of knowing whether a bag was in good order and condition at the time it is placed on board a vessel in India and more especially in Bombay. Some of the witnesses declared that a bag of rice always weighs two maunds or 75 kilograms and that a consignee or purchaser in Mauritius is entitled to reject a bag which is under that weight; others contended that such a Custom of Trade, altho' it may exist for transactions taking place in Mauritius, is not admitted in so far as shipments made in India are concerned, more especially when the freight is payable per bag and the words "weight and contents unknown" are inserted in the bill of lading; one of them Mr Povah Ambrose, added however that altho' it is not always easy to ascertain by the appearance what is the weight of a bag and there is no usage of trade according to which a difference in weight constitutes bad order and condition, still a bag to be in good order and condition must be *presentable.*

JUDGMENT

The Defendant had undertaken to convey from Bombay to Mauritius 600 bags of rice which he declared in the bills of lading to have received on board his ship in good order and well conditioned to be delivered to the Plaintiff in the like good order and well conditioned.

The point I have to examine is therefore whether it results from the evidence I have before me that there has been a breach of contract on the part of the Defendant, and consequently whether he is liable to pay damages to the Plaintiff.

The Report and deposition of Capt. Russell R. N. Surveyor to the Vice Admiralty Court, who examined the 600 bags of rice on the wharf before they were weighed and delivered to Plaintiff, leaves no doubt as to the state in which a great number of those bags were, he says that he could detect from a simple inspection of the bags that many were not in good order and condition, that the defects were quite apparent, that about 20 of them had been patched, about 50 per cent were slack, and that in his opinion the bags must either have been shipped in bad order and condition, or tampered with during the voyage; for bags, if shipped in good order and taken care of on board, would not be damaged by the voyage. Other witnesses called by the Plaintiff confirm this evidence of Capt. Russell. The explanations given by the Defendant and his mates, and already mentioned, would tend to shew that there has been no tampering with the rice during the voyage, and I am disposed to admit their evidence upon this point as trustworthy, altho it would have been better for all parties if the Plaintiff had been warned by the Defendant of the state of the bags of rice consigned to him, before he began to patch and resow the damaged bags previous to landing them. But the reasons assigned by those witnesses to the origin and cause of the damaged state of many of the bags are not sufficient to allow me to exonerate the Defendant completely from his responsibility as a carrier.

It may be, as it was argued on behalf of the Defendant that the rice came from Calcutta, and that many of the bags suffered during the voyage from Calcutta to Bombay before they were shipped on board—the "Robert Morrison", but then it was the duty of the Defendant as Master of that ship not to accept the bags the appearance of which was not satisfactory, as being in good order and condition, and not to sign bills of lading in which he declared that the goods sent to the Plaintiff were in such good order and condition—I cannot admit, in presence of the evidence laid before me, that if the bags were in good condition when they were shipped at Bombay, they should have so rapidly decayed during the voyage, because the ship called at

Colombo, and the length of the voyage was thereby increased by 14 days from what it is generally between Bombay and Mauritius. Having rejected the supposition that the bags were tampered with during the voyage, I must necessarily come to the conclusion, which appears to me the most probable and reasonable one from all the evidence here, that a good many of the bags when they were placed on board the " Robert Morrison " in Bombay, had already begun to suffer from the natural decay of which the Defendant and his witnesses have spoken, and that they were not therefore in that presentable state which Mr Povah Ambrose has declared to be necessary in order to constitute a bag in good order and condition.

It was argued for the Defendant that he has guarded himself against any claim as to the weight on account of the words " weight and contents unknown "—inserted in the bills of lading, and that it has not been proved that a usage of trade exists according to which a bag of rice in India not weighing two maunds should not be accepted on board a ship, because it would not then be in good order and condition.

Although it has been shewn that for transactions in Mauritius the purchaser is entitled to reject a bag of rice which does not weigh two maunds or 75 kilog., it has not been proved to my satisfaction that in India for the purposes of a contract of affreightment a bag not weighing two maunds is not considered as a bag in good order and condition, so the Master of a ship cannot in ordinary circumstances when the bags appear to be in good order and condition be responsible for a mere deficiency in the weight of the bags.

But at the same time I consider that it would be very dangerous to accept excuses as those given by the Defendant in the present case, when it is shown that many of the bags, if not tampered with during the voyage as I am willing to admit, could not possibly have been in good order and condition when shipped at Bombay—the presumption being that the packing of goods is proper and in a fit state for transportation, if the Master, after having declared in a bill of lading that the goods received by him are in good order and condition, were allowed, in circumstances like those of this case, to plead that the damage resulted from the natural decay of the packing, the consequence would be that proper attention would not be paid by ship Masters at the time of the shipping of goods to their apparent exterior condition, and that such carelessness would indirectly favor the fraud of consignors. The duty of the ship Master is no doubt to see that the goods received by him are in good order and condition before he declares that they are so in his bill of lading, and if he has not examined them carefully, or had them examined by his officers, before signing the bill of lading, he must suffer for the consequences. It is not sufficient for him to add " weight and contents unknown " to be sheltered from all responsibility ; a bag may not always contain exactly two maunds or 75 kilog. but the bad state of so many of the bags must have been apparent at the time of the shipping, for otherwise such a large proportion of the bags would not have had to be resewn and patched before being landed in Mauritius, I must therefore come to the conclusion that such bags could not have been in good order and condition when they were placed on board the " Robert Morrison."

One of the excuses given was that holes in the bags may have been made by rats, I need hardly say that this is no excuse under the English Maritime Law, and besides the action of the rats could not have been very great, as only five or six bags of sweepings were found after the landing of the whole cargo.

Allusion was made in the course of the argument by the Defendant's Counsel to the charter-party which was entered into for a lump sum with a Merchant of Bombay, but as the bills of lading held by the Plaintiff were signed by the Defendant without any reservation as to the charter-party, and the goods mentioned in those bills of lading were not shipped by the charterer, I do not see what influence this charter-party can have on the responsibility of the Defendant, as Master of the " Robert Morrison ", towards the Plaintiff holder of the said bills of lading, I must therefore hold that the Defendant although he may have acted with good faith is at fault for having failed to deliver to the Plaintiff in good order and well conditioned a large number of the bags of rice which he declares in his bill of lading to have received for him at Bombay in good order and condition and that he must pay to Plaintiff a fair indemnity on account of the state in which he landed part of the cargo consigned to Plaintiff, and considering the large proportion of bags resewn and patched and the evidence as to the extent of the loss complained of by Plaintiff, I am of opinion that the Defendant should pay a sum of Rs 250 to Plaintiff as damages. I must also hold that the delays which took place before the rice could be examined weighed and delivered, as well as the surveying and weighing of the rice were the consequences of the first acts of the Defendant and that he must repay to Plaintiff the

fine and costs paid by him for having allowed his rice to remain on the wharf longer than the law permits and the expenses of survey and weighing as well as the costs made to give him notice of these operations.

Judgment will be signed against Defendant by the Registrar for the sum found by him, after examination to be due to Plaintiff in virtue of this decision with costs.

SUPREME COURT

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CLAIM OF THE PURCHASE PRICE OF A HOUSE—DELEGATION BY VENDOR OF THE SUM DUE TO HIM BY PURCHASER,—BANKRUHTCY OF VENDOR,—ASSIGNEES OF VENDOR TO BE PUT IN THE CAUSE.

In this case the Court ordered that the proceedings be laid before the Assignees of the Vendor (Joly the Husband) so as to give them an opportunity to intervene for the protection of the rights of the creditors of the Bankruptcy Joly.

—

JOLY THE WIFE,—Plaintiff

versus

PERDREAU,—Defendant

—

Before

His Honor N. G. BESTEL,—Acting Chief Judge

and

His Honor E. J. LECLEZIO,—Acting Second Puisne Judge

—

L. ROUILLARD,—Of Counsel for Plaintiff
V. BOULLÉ,—Attorney for the same

P, L. CHASTELLIER,—Of Counsel for Defen-
G. RITTER,—Attorney for the same [dant

Record No. 19,580

15*th May* 1879

The Plaintiff in this case with the authorisation of her husband Victor Joly claims from the Defendant Perdreau a sum of one Thousand Dollars ($1000) with interest at nine per centum per annum from the 23rd February 1874, up to this day and likewise a sum of $ 162 for notarial costs paid by her to Notary Gimel plus for Attorney's costs $ 10.18c. and for costs of suit valued at $ 60 giving a total amount of $ 1517.18c. In support of this demand the Plaintiff alleges that her husband from whom she is now separated as to property, being indebted to her in a larger sum than the one demanded of the Defendant was the proprietor of a house in La Paix steet, in this town of Port Louis. That the purchase by Joly the husband of the said immoveable property was made partly with his own monies and partly, say one Thousand Dollars ($1000) of her own personal monies which she had inherited from her brother Georges Blancard and of her paternal grand mother the widow Pons Blancard. That on the sale by Joly her husband to Defendant Perdreau of the said immoveable property so purchased by Joly with the $ 1000 belonging to her, Joly delegated to his wife a like sum in part payment of his debt to the Plaintiff his wife and directed Perdreau to pay the $ 1000 to Plaintiff in discharge of Joly's debt to her. This delegation is to be found in the deed of sale by Joly to Pedreau in duplicate under private signatures of the 27th September 1873 duly registered. The delegation as alleged by the Defendant was not however accepted by Plaintiff Joly the wife until after the bankruptcy of the husband when the latter was disseised of all he possessed—and all his rights and all he was possessed of had vested in the assignees of his bankruptcy. So says Perdreau in his plea which runs thus—" because the claim founded upon by the Plaintiff is a mortgage one, and under our Bankruptcy Law the immoveable property described in Plaintiff's declaration could not be mortgaged by Victor Joly on behalf of his wife and the alleged delegation by Joly on behalf of his wife is but a disguised mode of conferring a mortgage upon his property in favor of his said wife."

And his fourth plea runs thus : " Because supposing the delegation could legally be made to Joly the wife, the latter accepted the same too late, and the said acceptance is invalid, having been made after Joly the husband was before the Bankruptcy Court and the Official Assignee vested with all his rights."

But assuming the correctness of the facts alleged we are at a loss to understand how Perdreau could be relieved from the fulfilment of his obligation either to Joly or to his

wife. The assignees became vested with all the righs of the bankrupt it is true, but subject to all his liabilities. The assignees might well urge such a plea. But what right has the Defendant to avail himself of the bankruptcy of Joly to refuse the fulfilment of his obligation to the Plaintiff? has he ever been subrogated into the rights of the assignees? No? Upon such a plea and fear expressed by the Defendant of being called to account by the assignees to pay to them the sum demanded of him by Joly the wife, Perdreau argued that he could not be compelled to pay the said sum to the Plaintiff. The assignees not being in the cause we must abstain from proceeding further with this case, and we order that the proceedings in this cause be laid before the assignees so as to afford them an opportunity to take a part in the present discussion should they be so advised for the protection of the rights of the creditors of the bankruptcy Joly. Costs reserved.

BAIL COURT

ACTION IN DAMAGES FOR MALICIOUS ARREST BY A STATION MASTER, — MEANING OF "WILFUL TRESPASS",—UNDER ART. 27 OF ORDINANCE 8 OF 1864,—POWERS OF STATION MASTERS.

In this case the Plaintiff claimed damages from the Defendant, a Station Master, for having caused him to be arrested on the platform of a Railway Station;

The Plaintiff averred that the arrest had been made from malicious motives and with the intention of injuring him in his reputation and character;

That apart from any question of malice the arrest was an illegal one, and that under Article 1382 of the Civil Code, the Defendant was bound to repair any damage resulting therefrom to the Plaintiff.

Held that the Plaintiff had completely failed to prove malice on the part of the Defendant;

That in construing the words "wilful trespass" mentioned in Article 27 of Ordinance 8 of 1864 it was natural to regard them as applicable to conduct analogous to "obstructing and impeding" Officers or Agents of the Railway Department;

That in this case it was clear that the Plaintiff's intention, at and before his arrest, was to annoy and insult the Defendant, and as a consequence to interfere with and hinder him in the due discharge of his duty;

That, in these circumstances, the Defendant, as Station Master, was entitled to regard Plaintiff as a trespasser, and in virtue of his powers under Article 27 of Ordinance 8 of 1864 to cause the Plaintiff to be seized and detained, and that accordingly neither the arrest nor the subsequent detention was illegal. Case dismissed with costs.

JOSEPH JOSÉPHINE,—Plaintiff

versus

HENRY ROGERS,—Defendant

Before

His Honor A. G. ELLIS,—Acting First Puisne Judge

L. T. JENKINS,—Of Counsel for Plaintiff
A. DESVEAUX,—Attorney for the same

L. ROUILLARD,—Of Counsel for Defendant
G. KŒNIG,—Attorney for the same

Record No. 6,481

17*th May* 1879

This is an action at the instance of a Teacher in an Elementary School at Souillac against the Station Master there, in which the Plaintiff sues for damages for malicious arrest. The Plaintiff alleges that on the 17th of June last while he was waiting on the platform of the Railway Station of Souillac for the arrival of the last train from Port Louis, the Defendant caused him to be arrested and taken to the Police Station, and there charged him with having committed a trespass, and that the arrest was made "thro' "malice, without any cause or motive, and "with intent to injure Plaintiff in his char- "acter and reputation, and in his person."

The fact that the Plaintiff was arrested by the orders of the Defendant, was not disputed, and the evidence on both sides was mainly directed to elucidating the circumstances which led to the arrest. The Plaintiff states that whilst he was waiting on the platform for friends whom he expected to

arrive by the train, the Defendant came up to him and asked him " what he was doing there " and upon the Plaintiff's informing him that he was " looking for a man called Soleil " abused him and said " do you want to play the fool with me "; that without replying he turned and walked towards the exist from the Station; that while speaking to some friends the Defendant again came up, when he (the Plaintiff) said to him " if you tell me to leave the platform I will do it immediately "; that the Defendant replied " I have already told you that ", which was not the case; that thereafter when about to pass out of the Station door, he heard his name called, turned to see who called him and was continuing his way by passing round one of the pillars of the verandah when the Defendant caused him to be arrested and taken to the Police Station.

Such is the account of the arrest sworn to by the Plaintiff, and if we are to accept his story he has been the victim of an arrest for which there was absolutely no cause, and which must be presumed to have been occasioned by malice: In the plaint no specific cause of malice is alleged, but the Plaintiff stated in his deposition that he had been told that the Defendant had a grudge against him as the supposed author of certain letters published in one of the newspapers. As the Plaintiff has not thought fit to examine the persons who informed him that the Defendant bore him malice, nor even to produce the newspapers containing the letters which he suggests gave rise to this feeling, and as the Defendant formally denies that when he he ordered the Plaintiff to be arrested, the thought that he was the author of the letters, was present to his mind, it could not have been assumed that the arrest was due to specific malice of the existence of which there is no evidence, resulting from letters which have not been produced. At the same time if the Plaintiff's version of what occurred be true, malice must be presumed as the only reasonable explanation of the arrest.

We must therefore examine whether the account given by the Plaintiff can be accepted as strictly accurate. Throwing out of view for the moment the deposition of the Defendant, the evidence of the Plaintiff's own witnesses satisfies me that it can not. When the Plaintiff and Defendant first met in the evening in question Sergeant Major Cowles was present, and the account which he, an independent witness, called by the Plaintiff, gives of what passed between them is essentially different from that given by the Plaintiff. Cowles states that as he was talking to the Defendant, the Plaintiff came towards them looking up at the sky; thereupon the Defendant asked him " what he was looking for " to which the Plaintiff replied " that he was looking for the sun " as it was then nearly seven o'clock, and long after sunset, the Defendant said " Looking for the sun "? to which the Plaintiff answered " no, I am looking for the moon ". Thinking that the man was making fun of him the Defendant then told him, if he had no business there to leave the platform.

Comparing this account of what passed with that given by the Plaintiff, it will be seen that it puts the case in a totally different light. The Plaintiff would have us believe that the Defendant accosted him, demanded what he was doing on the platform and on being informed that he was looking for a man called Soleil, abused him and accused him of trying to play the fool with him.

Between the two stories I have no hesitation in accepting that of the Sergeant Major which, besides being that of an independent witness, is intelligible, gives a reasonable explanation of what occurred, and is also corroborated by the statement of the Defendant, the only other person present at the moment.

From the Defendant's evidence it appears that a few moments before, he had gone to the Telegraph office on duty, and found there a number of persons who were obstructing the office. In order to clear the office he called their attention to the notice which was posted up outside requesting the public not to enter. Amongst others the Plaintiff happened to be there, and doubtless irritated at being interfered with, he followed the Defendant upon the platform with the object of what is termed " chaffing " him. Happening to be expecting to meet a man nicknamed " Soleil " he pretended to be looking for something in the sky. As he expected, the Station Master fell into the trap and asked him what he was looking for. On receiving for answer the reply " I am looking for the sun " the Station Master most naturally supposed that he was being made fun of, and equally naturally told the practical joker to be off if he had no business there. The Plaintiff is shewn by the evidence twice to have approached the door leading off the platform as if about to leave it, and twice to have turned back and advanced towards the Defendant. The second time, the Defendant seeing, as he thought, and not unnaturally, that the Plaintiff was persisting in making fun of him, directed a constable who was standing by to arrest him.

These being the facts of the case as disclosed by the evidence we must now see how far they warrant this claim for damages. The ground upon which the action is based is malicious arrest, the Plaintiff's allegation is that the arrest was made from malicious motives and with the intention of injuring the Plaintiff in his character and reputation. As I have already indicated, in my opinion the proof of malice, which was hardly attempted, has completely failed here. It was however contended that apart from any question of malice, the act was an illegal one, as has been held by the District Magistrate, and that accordingly, under Article 1382 of the Civil Code, the Defendant is bound to repair any damage resulting to the Plaintiff from it. This raises the question whether or not the arrest was in this instance an illegal act? The fact that it has been held to be so by the Inferior Court is not conclusive of the question in this suit where the demand is a totally different one.

I would have been inclined to regard the conviction obtained before the District Magistrate to be *primâ facie* evidence of the illegality of the act, but the Defendant has adduced evidence and referred to the law upon the matter with the view of rebutting this presumption. The clause in the law relied upon as empowering the Defendant to act as he did is Article 27 of the Railway Ordinance (Ordinance No. 8 of 1864) which enacts that any officer of the Railway Department may cause to be seized and detained "any person "who shall wilfully trespass upon the Rail- "way or in any Station or works or premises "connected therewith, and shall refuse to quit "the same upon request to him made by "any officer or Agent of the Railway Depart- "ment." The question is whether the Plaintiff has been guilty of a "wilful trespass" in the sense in which the words are used here? The word *trespass* is generally employed with regard to infringement of private property, and applies to any unwarrantable entry upon the land of another. When however the word is used with reference to what is public property even tho' set apart for a specific purpose as the Stations and Platforms of the Railway Department are—I do not think that every entry which would be a trespass on private property will constitute a trespass upon such premises. What then is the additional element which is necessary to render a person who is on the platform, without any business to be there, a "wilful trespasser", and subject him, upon refusing to leave it, to be seized and detained? I think the general nature of the element may be gathered from the context of the article, a part of which is above quoted. That clause deals primarily with the case of persons "obstructing and impeding officers or agents of the Railway Department in the execution of their duty and then puts wilful trespassers" in the same category and subjects them all to seizure and detention. It is natural therefore in construing the term "wilful trespass" to regard it as applicable to conduct analogous to "obstructing or impeding" officers or agents of the Railway Department. It would be difficult, if not impossible, to define generally what conduct will render a person who has no business on a Railway platform liable to be regarded and treated as a trespasser and as belonging to the same category as that of persons obstructing and impeding officers of the Railway in their duty. Every case must be judged of on its own merits; but I have no hesitation in holding that the Plaintiff here came within that category. He was not on the platform for any of the recognized objects for which such places are provided. His intention, in the view I take of the evidence, at and before his arrest, was to annoy and insult the Station Master, and the natural consequence of his conduct was to interfere with and to hinder him in the due discharge of his duty. In these circumstances I think the Defendant, as Station Master, was entitled to regard him as a trespasser, and, in virtue of his powers under Article 27, to cause him to be seized and detained. The Plaintiff swore before me that his detention lasted for 45 minutes—but this statement I cannot for a moment accept, contradicted as it is by a letter written by him on the following day to an officer of the Railway Department complaining of the fact, in which he states that it lasted only 5 minutes, and by the evidence of his own witness, the Sergeant Major, who says it lasted from 5 to 10 minutes. The actual period was not, I believe, longer than was necessary in order to take the requisite steps for ensuring his appearance before the District Magistrate. I am, therefore, satisfied that neither the arrest nor the subsequent detention was illegal.

As the Plaintiff has failed to prove that the act upon which he rests his claim for damages was either malicious or illegal, I dismiss his action, and find him liable to the Defendant in costs.

BAIL COURT

—

ACTION IN DAMAGES FOR SHORT DELIVERY OF GOODS,—PRELIMINARY OBJECTION TO FORM OF ACTION,—AGENTS OF A SHIP NOT BE SUED,—MASTER OR OWNERS ALONE RESPONSIBLE.

In this case the Plaintiff sued the Defendants in their capacity of Agents of the Ship Nenuphar, and claimed from them acting as such, delivery of fifty bags of Ballam rice in good order and condition which had been consigned to him, or in default to pay to him the sum of Rs 506.85 *cents.*

The Defendants urged as a preliminary exception, that the action had been wrongly entered against them as Agents of the Ship Nenuphar, and that the Master or the owners of the Ship being alone personally responsible under a bill of lading, the action ought to have been entered against the Master while he was still in the harbour of Port Louis, as they had no special authority to represent the owners of the ship in a law suit based upon the non execution of a contract of affreightment.

The Plaintiff answered that the Defendants had such power to represent the owners, and moved for leave to amend so as to put in the cause the owners represented by their Agents the Defendants ;

Held that the Defendants had been wrongly sued as Agents of the Ship Nenuphar : That they either should have been sued as personally bound towards the Plaintiff ; or the action should have been entered against the Master or the owners of the Ship personally or represented by persons holding sufficient mandate from them.

The Court granted the amendment prayed for, so as to allow the Plaintiff to call the owners of the Nenuphar as the real Defendants in the cause represented by the present Defendants. The Plaintiff further to prove that the firm Saboo Sidick & Co. had the power to represent the owners of the Nenuphar in the present action.

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CASSIM AHMED BHOMJEE,—Plaintiff

versus

HAJEE SABOO SIDICK & Co. Defendants

Before

His Honor E. J. LECLÉZIO,—Acting Second Puisne Judge

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L. V. DELAFAYE,—Of Counsel for Plaintiff
E. SAUZIER,—Attorney for the same

L. COX,—Of Counsel for Defendants
F. ROBERT,—Attorney for the same

Record No. 6,489

29th May 1879

The Plaintiff in this case a Merchant of Port Louis, sues the Defendants who are also Merchants in this island, in their capacity of Agents, of the ship " Nenuphar " and asks the Court for the reasons set out in the plaint to condemn the Defendants *acting* as aforesaid to deliver to him Plaintiff fifty bags of ballam rice marked as in the plaint mentioned in good order and condition, or in default thereof to pay to him the sum of Rs 506 and 85 cents. *Cox* for the Defendants argued as a preliminary exception that the action had been wrongly entered against the Defendants as Agents of the ship " Nenuphar " ; that the owners of the ship or the Master ought to have been sued and named in the plaint as principals as no process can be brought against an Agent unless the principal is named ; that besides, if in the present case, the action had been introduced against the owners represented by the Defendants they would have shewn that their Agency was limited to certain acts while the ship was in the harbour of Port Louis, but that they had no special authority to represent the owners of the ship in a law suit based upon the non execution of a contract of affreightment ; the Master or the owners being alone personally responsible under a bill of lading, the action ought to have been entered against the Master while he was still in the harbour of Port Louis.

Delafaye for Plaintiff answered that before the action was entered there had been documents signed by Defendants such as receipts for freight and also extra judicial acts served at their request upon Plaintiff, in which they assumed the capacity of Agents of the ship " Nenuphar ", and as the contestation arose while the ship was here, the Plaintiff was led to suppose they had an implied mandate to represent the owners, and if the Court thought the action was not properly entered, he prayed for leave to amend so as to put in the cause the owners of the ship represented by their Agents Hajee Saboo Sidick & Co.

JUDGMENT

It is not alleged in the plaint which I have before me that the Defendants have by their acts as Agents of the ship " Nenuphar " after the landing of the cargo, rendered themselves personally liable towards the Plaintiff for the non delivery of the rice now claimed, nor is the Court asked to give judgment against them personally ; they are sued as Agents of the ship, although it is not stated that they represent either the owners or the Master of of the said ship, and the Court is asked to condemn them acting in the said capacity of Agents.

It was argued by the Plaintiff that the Defendants led him into error because they signed receipts for freight and had extra judicial acts served at their request in the capacity of Agents of the ship " Nenuphar ", and that besides the cargo was stored in warehouses under the control of the Defendants and delivery orders issued by them in favor of Plaintiff on their warehouseman, such acts might perhaps have been invoked by Plaintiff as rendering Defendants personally liable towards him, or might have induced Plaintiff to sue the owners of the ship represented by the Defendants if he thought that the said acts implied a continuation of Agency of such a nature as to allow Defendants to represent the owners in an action at law ; but I do not think that they warranted the shape in which the action has been entered, that is to say the introduction of the plaint against the Defendants *acting as Agents of the ship* " Nenuphar ". They should either have been sued as being personally bound towards Plaintiff or the action should have been entered against the Master or the owners of the ship personally or represented by persons holding sufficient mandate from them.

Have the Defendants sufficient mandate to represent the owners of the " Nenuphar " ? The Plaintiff says they have and moved to be allowed to amend by calling them as the real Defendants represented by Hajee Saboo Sidick & Co. I am disposed to allow such amendment as I consider that the intention of the Plaintiff was to reach the owners of the " Nenuphar " and not Hajee Saboo Sidick & Co. personally by entering his action as he did. But it will be for the Plaintiff to satisfy the Court, in case the amendment be made, that Hajee Saboo Sidick & Co. have the power to represent the owners of the ship in the present action. A delay of 8 days is hereby granted to Plaintiff to amend his plaint in the sense of his motion, and if within the said delay the amendment has not been made the case will be called and the Plaintiff non suited.

SUPREME COURT

—

DIVORCE FOR WILFUL DESERTION,—SEPARATION ON THE GROUND OF INCOMPATIBILITY OF TEMPER NOT WILFUL DESERTION.

Held that a separation the origin and continuance of which were due to incompatibility of temper did not amount to wilful desertion on the part of the spouse who had withdrawn from the conjugal roof.

That to entitle one of the spouses to claim a divorce on the ground of failure to fulfil one of the essential duties of marriage i. e. cohabitation, the failure must not be attributable to fault of the spouse founding on it ;

And that in this case, the Plaintiff had failed to shew that the Defendant's act in withdrawing from her house was not one occasioned by her own improper behaviour to him.

—

SAPET THE WIFE,—Plaintiff

versus

SAPET THE HUSBAND,—Defendant

—

Before

His Honor A. G. ELLIS, —Acting First Puisne Judge

and

His Honor E. J. LECLÉZIO,—Acting Second Puisne Judge

—

T. L. JENKINS,—Of Counsel for Plaintiff
E. CHAILLET,—Attorney for the same

The Defendant left *default*

Record No. 20,216

5th June 1879

In this action the wife craves a Divorce on the ground of desertion by her husband. The act

is sufficiently shown to have taken place more than 5 years ago, so if the separation of the spouses is due to the wilful desertion of the husband, it is a proper cause of divorce.

But, was the withdrawal of the husband from the house belonging to his wife where they had formerly cohabited, in this instance an act of " Wilful desertion " in the legal sense. To be so, it must have been a wilful abandonment of her, not justified by her conduct. In this instance the husband leaves default, and accordingly the wife must establish the ground on which she makes her demand for a divorce.

We are clear that a separation which owes its origin and continuance to incompatibility of temper does not amount to wilful desertion on the part of the spouse who withdraws from the conjugal roof. To treat this as wilful desertion would be to introduce a modified form of divorce by mutual consent which it was one great object of the Ordinance of 1872 to abolish.

In this case, after mature reflection we are not prepared to hold that the Plaintiff has made out her case. We think that she has failed to show that the Defendant's act in withdrawing from her house was not one occasioned by her own improper behaviour to him. Very soon after the separation, the Defendant in reply to a letter in which she asks him to resume cohabitation with her, wrote a letter (which is produced and founded on by her) in which he clearly implies that he left her because she had not displayed towards him the respect and submission due by a wife to a husband, and practically offers, on her apologising for her conduct and promising amendment, to return to her. We have had no evidence that the accusation contained in this letter of want of due submission was unfounded, or that the Defendant abandoned Plaintiff without any good reason. We cannot therefore assume that it is untrue, but as the letter is founded on by the Plaintiff, we must assume that the statements contained in it, and not contradicted by the rest of the evidence in the cause, are true.

Assuming that it is true that the Plaintiff was wanting in proper respect and submission to her husband and that on this account he left her, and that his continued absence is due to her declining to apologize or to promise amendment, we do not think that the separation can be said to amount in law to " Wilful desertion". To entitle one of the spouses to claim a divorce on the ground of failure to fulfil one of the essential duties of marriage—viz : Co-habitation, the failure must not not be attributable to fault of the spouse founding on it. She must come into Court with clean hands. The Plaintiff owed respect and submission to her husband, and if her failure in this essential duty caused him to withdraw from the conjugal roof, and her continued failure is the cause of his continued absence, we cannot regard her as in a position to plead that as amounting to " wilful desertion ". It is a separation due in part at least to her fault and therefore is rather a separation by mutual consent than anything else, and is not a ground of divorce. It may be, tho' no evidence was adduced to satisfy us of this, that the pretentions of the husband, and the reason assigned by him, for refusing to return to her are unfounded, and therefore we shall only dismiss the action, in the event of the Plaintiff declining to elect to be nonsuited.

BAIL COURT

—

ACTION IN DAMAGES,—FAUTE, — ARTICLE 1382 OF CIVIL CODE,—DISMISSAL OF AN ACTION NOT ALWAYS A GROUND FOR CLAIMING DAMAGES.

Held that the mere dismissal of an action in every case would not ground a demand for reparation of injuries occasioned to the Defendant by its institution; but that, in this case, the dismissal of the action for validation of the provisional seizure asked for by the Defendant, in the former case, raised a strong presumption that the Defendant, then Plaintiff, had acted without sufficient cause and imprudently and that therefore he was guilty of " faute " according to Article 1382 *of the Civil Code and liable in damages.*

The Court accordingly found the Plaintiff in this case entitled to Rs 600 *damages with costs.*

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COMARADEE,—Plaintiff.

versus

HOSSEIN,—Defendant.

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Before

His Honor A. G. ELLIS,—Acting First Puisne Judge

L. ROUILLARD,— } Of Counsel for Plaintiff
L. A. THIBAUD,— }
E. LEBLANC,—Attorney for the same.

G. GUIBERT,—Of Counsel for Defendant.
G. BOULOUX,—Attorney for the same.

Record No. 6506.

5th June 1879

On sixth June last year, the Defendant, on an affidavit setting forth that the Plaintiff was indebted to him in the sum of Rs. 738, 54c. being the amount of an account due by the Plaintiff to Messrs. Richardson & Co., which had been guaranteed, and, at maturity paid by the Defendant, and that the Stock-in-trade of the Plaintiff was not worth more than Rs. 500 obtained from one of the Judges of this Court an order authorizing him at his own risk and peril, provisionally to seize the Plaintiff's Stock-in-trade. Immediately thereafter the Defendant entered an action concluding for the validation of the provisional seizure. In due Course, the case came before the Court, and, after hearing evidence, the learned Judge before whom it depended, dismissed it with costs.

The present suit is instituted by the Plaintiff to recover from the Defendant damages for the loss and injury resulting to him from the provisional seizure of his stock in trade effected by the Defendant. The Plaintiff alleges that the affidavit made by the defendant, and upon which the order for provisional seizure was obtained, was made without cause and maliciously, and that in consequence thereof he has been deprived of credit and prevented from carrying on his trade.

The action is based on Article 1382 of the Civil Code, and the plaintiff maintained that even tho' the proof of malice was wanting, he was entitled to recover damages for the injury suffered by him if from the evidence adduced it appeared that the Defendant in operating the provisional seizure had been guilty of "faute". In order to establish "faute" the Plaintiff relied on the record in the previous case, and argued that the fact that the action had been dismissed was evidence that the provisional seizure had been made by the Defendant maliciously or at least imprudently. The Defendant contended that the mere dismissal of an action was not evidence that it had been instituted by "faute", and did not therefore support a claim of damages for any injury thereby occasioned; that in order to entitle him to reparation for any injury resulting from the legal proceedings at the instance of the Defendant, the Plaintiff should have led evidence to show that these proceedings had been instituted from improper motives or at any rate imprudently. The Plaintiff further maintained that the judgment in the previous case (which it was alleged had proceeded on the ground that at the date of the seizure the Defendant had been repaid the amount paid by him as the Plaintiff's guarantee) did not constitute *res judicata* in this case; the demand here being different, tho' the parties and the issue were identical.

Without expressing any opinion upon the point last referred to, it is clear that the production of the Record is evidence, and the best evidence to establish that the action instituted by the Defendant was dismissed. I am not prepared to hold that, in every case, the mere dismissal of an action would ground a demand for reparation for injuries occasioned to the Defendant by its institution. But in this case we have a very special feature. The Plaintiff in the former action at the outset of his case applied for and, on his allegations, obtained an order authorizing him at his own risk and peril provisionally to seize the stock in trade of the then Defendant. His action for the validation of the seizure having been dismissed, I am disposed to regard that fact as raising a strong presumption that the provisional seizure was unwarrantable, and that in applying for it, and causing it to be effected, he acted without sufficient cause and imprudently, that is, was guilty of "faute". I am far from considering that this presumption is one which may not be controverted, but I think that it throws upon the party who made the seizure, the burden of proving that it was made with due cause and *bona fide*.

In this case, the Defendant has not seen fit to lead evidence for the purpose of showing that tho' his action for validation was dismissed, it was dismissed on technical grounds, and not because he failed to justify the claim upon which he based his demand for a provisional seizure. In these circumstances I think that the act of effecting the seizure must be presumed to have been an unjustifiable and imprudent one, and that, under Article 1382, the party at whose instance it was made is liable to make good to the Plaintiff any injury he may have suffered therefrom.

With reference to the *quantum* of damages, the evidence shows that the seizure greatly embarrassed the Plaintiff in his trade—that the fact that it had been made induced certain Merchants with whom the Plaintiff had formerly dealt on credit, to decline further transactions with him on that footing, and that, even after he had succeeded in obtaining its removal by finding security for the alleged

debt due to the Defendant and the costs of the action, the fact that it had existed would have rendered it difficult for him to have continued his trade in the same manner as formerly. Further, it would appear that the embarrasment caused to him by the seizure caused him to sell off his stock at a great sacrifice, and to discontinue trading. Accordingly I think the case is one for substantial damages, and estimating these as accurately as I can, I find the Defendant liable to the Plaintiff in damages to the amount of Rs. 600—and in the costs of the present action.

As the act, in respect of which the damages have been found due, has not been shown to be a fraudulent one, or one done in bad faith, I shall not order that the judgment be enforcible by caption of the body.

SUPREME COURT

—

ASSARAPIN AND WIFE,—Appellants

versus

APPAODOO,—Respondent

—

Before

His Honor N. G. BESTEL,—Acting Chief Judge

and

His Honor E. J. LECLEZIO,—Acting Second Puisne Judge

—

Record No. 87

10*th June* 1879

A motion was made a few days ago by *Pellereau* that this appeal from the judgment of the Stipendiary Magistrate of Grand Port should be heard and disposed of not before one single Judge in the Bail Court, but by the Supreme Court sitting with its usual quorum of two Judges.

This is the first time that such an application has been made. The practice had hitherto been that such appeals should be and they have in fact been disposed of by a single Judge in the Bail Court.

Upon consideration and after careful examination of the several laws quoted by *Pellereau* we have come to the conclusion that this appeal from a Stipendiary Magistrate's judgment be heard and disposed of by the Supreme Court with its usual quorum of two Judges.

SUPREME COURT

—

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE GIVEN UNDER ARTICLE 255 OF PENAL CODE,—POWER OF MAGISTRATE TO INFLICT BOTH IMPRISONMENT AND FINE,—ARTICLE 3 OF ORDINANCE 11 OF 1869.

Held by the Court, (dissentiente Ellis) that Article 3 of Ordinance 11 *of* 1869 *ought to be construed with the various Articles of the Criminal Laws which District Magistrates were entitled to apply, and that the limitation which was thereby put to their jurisdiction existed only as to the extent of the punishment to be pronounced by them, and not as to the cumulation which was enacted in the provisions of the Criminal Laws which might have to be enforced by such Magistrates.*

The Court accordingly dismissed the appeal with costs.

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GAMIN,—Appellant

versus

THE QUEEN, — Respondent

—

BEFORE THE FULL BENCH

—

T. L. JENKINS,—Of Counsel for Appellant
E. LEBLANC,—Attorney for the same

E. M. WOOD, } Substitute Procureur General
W. NEWTON, } of Counsel for Respondent
J. BOUCHET,—Attorney for the same

18*th June* 1879

When this case which is an appeal from a conviction of the District Magistrate of Pamplemousses was argued before the Bail Court, the Presiding Judge reserved two of the points of law raised by the reasons of appeal for

argument before the three Judges as he considered them to be of very great importance.

The Appellant was condemned under Art. 255 of the Penal Code to ten months' imprisonment and to a fine of two hundred Rupees, and it was stated that this sentence was excessive as under Art. 3 of Ordinance 11 of 1869, which now determines the jurisdiction of District Magistrates in Criminal Matters, they have no right to condemn any offender whom they may be competent to try, to the cumulative punishments of imprisonment and fine.

This Article runs as follows: "Whatever "may be the minimum of punishment im- "posed by the Penal Code with respect to "any crime or misdemeanor; the District "Courts, in every case in which they have "jurisdiction shall nevertheless entertain such "case, but it shall not be lawful for any "District Magistrate to award against any "offender a severer punishment than impri- "sonment for a period not exceeding twelve "months, or a fine not exceeding £ 50."

It was contended for the Appellant—first, that to read this Article as containing power given to the Magistrate to impose both punishments, would be simply to substitute for the disjunctive conjunction "or", the copulative conjunction "and", which could not be done without altering the sense of the phrase—and thereby adding to the jurisdiction of the District Magistrate with regard to the extent of punishment; and 2o. That the Magistrate having exceeded his jurisdiction by imposing two punishments instead of one only, the conviction was null and void and the Court of Appeal could not amend or alter the sentence, but was bound to quash the whole conviction.

For the Respondent it was answered that the first point had already been invoked in the case of *Montille versus Queen*—Piston's Reports 1865, page 155—and it was settled by the judgment in that case that District Magistrates had the right to inflict both imprisonment and fine cumulatively in those cases in which under the Penal Code offenders may be punished by both, and with regard to the 2nd point, it was argued that if the Court were of opinion that the Magistrate had no right to inflict both imprisonment and fine, the Court might, in virtue of Article 123 of Ordinance 35 of 1852, amend or alter the sentence by deleting that part by which the fine was imposed.

These points are not without some difficulty. We shall now proceed to the examination of the first point. If Article 3 of Ordinance No. 11 of 1869 stood alone, its wording might perhaps have led us to the conclusion that the Legislator really meant to give to District Magistrates only an alternative power of condemning offenders tried by them, either to imprisonment or to a fine, and in no case to both. But we think that to understand the meaning of this Article, it is necessary to look at the state of Our Criminal Legislation at the time District Magistrates were created.

Ordinance No. 6 of 1838—commonly called the Penal Code of Mauritius, contains a considerable number of provisions in which besides the punishment of imprisonment, that of a fine may be inflicted for the offences therein described. It is hardly necessary to say that Our Penal Code was copied almost literally from that of France; the economy of that Law is evidently in very many cases to punish offenders not only by a depravation of liberty, but also to reach them in their pecuniary resources—*Professor Boitard* in his *Leçons de Droit Criminel* § 45 writes as follows. "Quant à l'amende qui est une peine "commune aux matières criminelles et aux "matières correctionnelles, vous la trouvez "prononcée beaucoup plus fréquemment en "matière correctionelle qu'en matière crimi- "nelle—c'est surtout dans les matières cor- "rectionnelles qu'il a pu paraître utile de "fortifier par une amende ce que la sanction "pénale, personnelle, corporelle, pouvait pré- "senter d'incomplet."

The matters which formerly were within the jurisdiction of the Court which was called *Tribunal Correctionnel*, now generally fall within the jurisdiction of our District Magistrates among others the offence for which the Appellant was tried and for which the punishment of both imprisonment and fine have been provided by the Penal Code. We do not mean to say that the District Magistrates have inherited the powers which the *Tribunal Correctionnel* possessed previous to the Ordinances of 1850 and 1852, but we merely state as a fact, that they are competent to try the offences which Boitard styles as "matières correctionnelles"—Now when the Court of First Instance which had the powers of a *Tribunal Correctionnel* was abolished, when the institution of the *Juges de Paix* was also abolished, and when the Supreme Court on the one hand, and the District Courts on the other, were organized as the sole Tribunals before which Criminal Cases could be tried, was it the intention of the Legislator to destroy to such an extent the economy of the Penal Code, as to place the newly created Magistrates in the impossibility of carrying out one of the great objects of Our Criminal Law, which, as we have seen, is to punish, if the Court consider it advisable to do so, an

offender both in his liberty and his fortune? The words used should leave no doubt as to the intention of the Legislator in order to warrant such a conclusion as this Article 101 of Ordinance 35 of 1852 which reenacted in the same words Article 99 of Ordinance No. 9 of 1850—is as follows:

"Every District Court shall be a Court of "Criminal Jurisdiction, and shall have cogni- "zance of all questions of fact and Law, in "all cases of crimes or of offences not punish- "able by death or transportation, provided "that it shall not be lawful for any District "Magistrate to award against any offender a "severer punishment than imprisonment for "a period not exceeding 12 months, with or "without hard labour, or any fine not exceed- "ing £ 50."

It was while this Article was in force, that the case of *Montille* above alluded to was decided, and this decision appears to have settled the jurisprudence of the Supreme Court upon this point; For we do not see any other case brought before it on appeal afterwards for the same reason. Every body seems to have accepted that the word *or* used in the phrase above quoted, had not such an importance as to interfere with the cumulative punishments enacted in so many provisions of the Penal Code, and to defeat the object those provisions had in view.

We must not forget that we are asked to interpret, not a clause of a Penal Statute punishing a particular offence, but a Section of an Ordinance fixing the jurisdiction of certain Courts and the extent to which they have to apply our Criminal Laws. We must therefore try to give to this section a sense which reconciles it with the Laws which are to be enforced by the Courts it creates, and not a narrow sense almost incompatible with the application of so many provisions of Our Penal Statute—and we are the more disposed to do so when we see that in many instances the Courts in England have read *and* for *or* and vice versâ, when they considered that it was advisable to do so in order to give to a statute the true meaning that must have been intended by the Legislator.

It was in presence of the decision in the case of *Montille* that the Legislature modified Article 101 of Ordinance No. 35 of 1852, and replaced it by Article 3 of Ordinance No. 11 of 1869, intituled "An Ordinance to extend the jurisdiction of District Courts in Criminal Matters", and altho' the Magistrates are deprived by the New Article of the power of sentencing to hard labor, the conjunction *or* between the word *imprisonment* and the word *fine* remains, as it was in Article 101 of Ordinance No. 35 of 1852. We cannot but conclude from this, that, if the Legislator had considered the judgment in *Montille* as a bad interpretation of that part of the Law then existing, he would not have preserved the same wording in reproducing it, the occasion would have been a very good one to decree, in other words, if such had been the real intention of the Legislature, that District Magistrates had not the power to inflict both imprisonment and fine in those cases in which the Penal Code enacts both together, but that their power was confined to the inflicting of one of them only. We must therefore presume that the intention of limiting the authority of District Magistrates in that respect, did not exist in the mind of the framers of the Ordinance of 1869. For the above reasons we agree with the opinion expressed by the learned Substitute and by *Mr Newton*, who were both heard on behalf of the Respondent, that Article 3 of Ordinance 11 of 1869 must be construed with the various articles of Our Criminal Laws which District Magistrates are entitled to apply, and that the limitation which is thereby put to their jurisdiction exists only as to the extent of the punishment to be pronounced by them, and not as to the cumulation which is enacted in the provisions of our Criminal Laws and which they may have to enforce. Having come to this conclusion, we do not think it necessary to examine the second point submitted for the consideration of the Court.

OPINION OF MR JUSTICE ELLIS

—

I have very anxiously considered the questions raised in this case, and it is with great reluctance that I find myself compelled to dissent from the view adopted by the majority of the Court:

The decision just pronounced by the Court turns upon the construction to be given to the final clause of Article 3 of Ordinance No. 11 of 1869, which runs as follows: "It "shall not be lawful for any District Magis- "trate to award against any offender a severer "punishment than imprisonment for a period "not exceeding twelve months, *or* a fine not "exceeding £ 50."

I have no doubt that, if these words were in any way *ambiguous*, or if it were necessary in order to give a meaning to a provision otherwise unmeaning the Court in construing the clause would be entitled to read it as if the word *and* had stood in the place of the word *or*, but in my opinion the provision just

cited is unambiguous and has a most clear and unmistakeable meaning.

The unambiguous and patent meaning of the words used appears to me to be to confer on a District Magistrate the power of sentencing an offender convicted before him to imprisonment for twelve months—or should he deem the offence one which ought to be visited by a fine—a fine of £50—but no severer punishment. This being the view I take of the clause I do not think in principle that there is any room for construing the terms and substituting a copulative for the disjunctive conjunction used. Nor do I think that any authority has been cited which would countenance the pretention that in interpreting plain and unambiguous words by which jurisdiction is conferred, the Court will assume that the legislature intended to vest in a New Tribunal powers to cumulate imprisonment and fine—formerly exercised by a Court which had been abolished—and, in order to give effect to this presumption, will read *and* for *or*. None of the cases cited appear in any way to warrant such a course. In one of the cases referred to, the Court in construing a Statute for Charitable uses (Maxwell p. 216) read *or* for *and*, but in interpreting such enactments the rule is to apply the most liberal construction, and further, the terms used in that case were not free from ambiguity. In the case of the Bankruptcy Act (Maxwell page 217), a similar substitution was made but only to avoid the absurd consequence, that by a literal construction of the clause, every trader who was absent from his house when a creditor called for payment, would have thereby become liable to be declared a bankrupt. Neither these, nor any other decision quoted, can by analogy support the substitution suggested in this instance.

It was said, that in reading this Ordinance by which power is given to Magistrates to punish offences created by the Penal Code—we must, if possible, give the language used a meaning in harmony with the Penal Code. Keeping in view that the admitted effect of the very clause with which we are dealing is to derogate from the provisions of the Penal Code by providing for the punishment of offences created by it in a way utterly inconsistent with its provisions, I do not think that the argument can be allowed very great weight—and I am clear that it cannot be admitted as warranting the Court in conferring on District Magistrates a jurisdiction in excess of that given them by the plain sense of this clause.

The decision in the case of *Montille versus The Queen*, (Piston 1865 page 155,) under Article 101 of Ordinance No. 35 of 1852, does not appear to me to assist us in construing this clause. The words in Montille's case are not free from ambiguity, and had they been repeated in this Ordinance I should have been disposed to concur in the result there arrived at. But the very modification made by Article 3 of Ordinance No. 11 of 1869 in the wording of the clause in the Ordinance of 1852, in my opinion removes the ambiguity, and with it any argument for construing the existing provision by that decision.

On the whole matter, I regard the language of this article as unambiguous and fitted to convey a definite meaning, and see no reason for construing the terms used so as to make them accord with a supposed intention of the legislator, at once hypothetical and at variance with the grammatical reading of the language employed.

As the conclusion arrived at by the majority of the Court on the question of the construction of this clause, disposes of the only remaining point in this appeal, it becomes unnecessary to examine the delicate question which has been argued, as to the power vested in the Court to amend or alter convictions or sentences on appeal.

In accordance with the judgment of the Court, the appeal is dismissed, with costs in favour of the Crown.

SUPREME COURT

BANKRUPTCY—ACTION TO RECOVER A SHOP IN OFFICIAL ASSIGNEE'S POSSESSION—RIGHT OF CLAIMANT TO ENTER HIS ACTION BEFORE THE SUPREME COURT.

Held that a stranger to a Bankruptcy having a contestation with the Bankrupt or his Assignees had the right of applying to the primary jurisdiction of the Supreme Court to have his pretention adjudicated upon, and was not bound therefore to apply first to the Bankruptcy Court, and afterwards to the appellate jurisdiction of the Supreme Court if he thought proper to appeal against the Commissioner's judgment.

That in this case, the Plaintiff being a stranger to the Bankruptcy of Ah-Hon was entitled to enter his action before the Supreme Court.

WONLYHE,—Plaintiff

versus

CAPEYRON & DELANGE & OR,—Defendants

Before

His Honor Mr Justice Ellis,—Acting First Puisne Judge

and

His Honor Mr Justice Leclézio,—Acting Second Puisne Judge

—

T. L. Jenkins,—Of Counsel for Plaintiff
E. Laurent,—Of Counsel for the same.

L. A. Thibaud,—Of Counsel for Defendants
A. Rolando,—Attorney for the same.

Record No. 20,137

26th June 1879

This action is entered by Plaintiff to recover from Defendants a certain shop situate in Farquhar street, Port Louis, which the Commissioner of the Bankruptcy of one Ah-Hon, who has absconded, placed provisionally by his order of the 8th January last in the possession of the Official Assignee of the said Bankruptcy, reserving at the same time the Plaintiff's right of proving before the competent Court that he is the owner of the said shop.

The Defendants took an exception to the jurisdiction of the Supreme Court and argued that in virtue of Ordinance 33 of 1853 the Commissioner in Bankruptcy had primary jurisdiction in matters of this kind, and the Supreme Court only an appellate jurisdiction.

JUDGMENT

The Plaintiff was called before the Bankruptcy Court by a summons in virtue of Art. 63 of Ord. No. 33 of 1853 to be examined upon oath as to his dealings with the bankrupt; he was bound to submit to such examination and to produce all documents in his possession; and it appears that after the enquiry made before him, the Commissioner thought it necessary to take conservatory measures and immediately ordered the Official Assignee to take provisional charge of the shop now claimed, but he also allowed a certain delay to the Plaintiff to take steps, if he chose to do so, before the competent Court, and there to show that the prima facie evidence laid before the Court of Bankruptcy was not sufficient to entitle the Official Assignee to sell the shop as being the property of the bankrupt.

Had the Plaintiff gone before the Court of Bankruptcy and asked the Commissioner to recall his order after a new and fuller enquiry, (as has occurred in some instances) there is no doubt that by submitting to his jurisdiction in the words of Art. 2 of Ord. 33 of 1853 the Plaintiff would have rendered him competent to adjudicate finally upon the ownership of the shop. But having entered his action before the Supreme Court in order to obtain a judgment declaring the shop provisionally seized to be his own, has the Plaintiff chosen an incompetent tribunal? in other words has Ordinance No. 33 of 1853 deprived parties who have constestations with a bankrupt or his assignees, of the right of applying to the primary jurisdiction of the Supreme Court to have their pretention adjudicated upon, and are they bound to apply first to the Bankruptcy Court and afterwards to the appellate jurisdiction of the Supreme Court, if they think proper to appeal against the Commissioner's judgment? Art. 68 of Ord. 33 of 1853 has been quoted to show that the Commissioner has power to dispose for the benefit of the creditors of goods and other property conveyed and transferred in certain cases by a bankrupt to *any person*, it is not quite clear that the present case could come under the terms of Article 68, but even if the transfer of the shop mentioned in Plaintiff's declaration were to be considered as one of the transfers contemplated by Article 68—is not this Article to be read by the light of Article 2 already referred to? We read in Shelford's Bankruptcy Law—Edition of 1862 page 2. "The jurisdiction in Bankruptcy has "authority to deal only with that which is "the Bankrupt's Estate, but has no power "to determine *what is* the Bankrupt's Estate. "If the question be a legal one, it must be "tried at law, and if it be an equitable one, it "must be decided in the Court of Chancery. "But when it is determined what is the pro- "perty of the bankrupt, the whole adminis- "tration of it falls under the jurisdiction of "the Court in Bankruptcy;" and at page 5. "Generally speaking the acts relating to "bankrupts give power to administer justice "between parties under or coming under the "Bankruptcy, and not over strangers."

In the case now before us, we cannot but consider the Plaintiff as a stranger to the Bankruptcy, who wants us to determine whether the shop which was in his possession at the time Ah-Hon was adjudicated a bankrupt, and which was placed as aforesaid in charge of the Official Assignee, is or is not part of that Bankrupt's Estate. We therefore think that the Plaintiff was not bound to submit to the jurisdiction of the Commissioner of Ah-Hon's Bankruptcy, and that he

was entitled to enter the present action before the Supreme Court.

The objection of the Defendants is overruled.

SUPREME COURT

MOTION FOR WRIT OF CERTIORARI. POWER OF DISTRICT MAGISTRATE TO POSTPONE A CASE IN ABSENCE OF AN ACCUSED DULY SUMMONED—ART. 105 OF ORDINANCE 35 OF 1852.

Held that a District Magistrate having the power in virtue of Art. 105 *of Ordinance* 35 *of* 1852 *to hear and dispose of a case in the absence of an accused who had left default when duly summoned, had necessarily the power also to adjourn the hearing of that case when he found that such a course was expedient, and that it was not essential for the validity of the proceedings that notice of such adjournment should be given to the accused.*

That in this case, as the principal accused could not have successfully attacked this conviction, the applicant had failed to allege any sufficient ground in law for the issue of the writ craved. The Court therefore refused his motion.

EX-PARTE :

CHARLES GAMIN,—Applicant

Before

His Honor N. G. BESTEL,—Acting Chief Judge

and

His Honor A. G. ELLIS,—Acting First Puisne Judge

T. L. JENKINS,—Of Counsel for Applicant
E. LEBLANC,—Attorney for the same

4th July 1879

In this case the Applicant moved the Court to issue a writ of certiorari, removing into this Court a conviction or order pronounced by the District Magistrate of Pamplemousses on the 13th day of May last, by which he was condemned to imprisonment and a fine as the accomplice of one Mrs in the crime of adultery. The Applicant alleges, and has filed an affidavit setting forth, that the information under which he was convicted charged Mrs as the principal and him as the accomplice in the said crime, and that the conviction following thereon sentenced them both to imprisonment, and him in addition to a fine ; that on 24th April, the Applicant was brought before the Magistrate on a warrant and was then remanded until 6th May, a summons being issued calling on Mrs to appear on the same day ; that on sixth May, the principal accused left default, and that after recording default, the case was then adjourned to 13th May, on which day it was proceeded with, and disposed of.

The ground upon which we are asked to issue the writ is that no fresh summons was issued calling upon Mrs to appear at the adjourned hearing on the 13th May, and answer to the charge ; and that in the absence of any such summons the proceedings against her were illegal and irregular, and the conviction obtained against her and against the Applicant, as accomplice in the offence, were incompetent. It was further alleged that the defect founded on appears *ex-facie* of the conviction.

In proceeding to consider whether sufficient grounds have been laid before us to call for the issue of the writ craved, we shall of course assume that the facts are as stated by the Applicant : that Mrs received no judicial intimation of the ajournment from 6th May, at which date she left default, to the 13th of the same month when evidence was heard and she and her accomplice convicted, and further that this appears on the face of the conviction itself.

It was not disputed that under Article 105 of the District Court Ordinance No. 35 of 1852, the Magistrate might competently have proceeded to hear and deal with the case upon the 6th May—when the principal accused left default—but it was contended that when in place of proceeding to dispose of the case on that day the Magistrate adjourned the case to another day, intimation of the adjournment and of the day to which the case was adjourned should have been served upon the principal accused.

In support of this contention the learned Counsel for the Applicant was unable to produce any authority. An authority, which was unnecessary, was cited showing that before trying a person for an offence it was necessary either to call the accused before the Court by summons setting forth the day and place of trial, or to bring him before the Court by warrant. But in this case the principal accused was duly cited before the Court for the 6th May, by summons served on her—and the question is, whether having left default on that day, it is necessary, for the regularity

of the proceedings, that judicial notice should be given her of the subsequent day to which it was found expedient by the Magistrate to postpone the case. For this proposition, no authority express or implied was laid before us. Nor do we think it wonderful, looking to the provisions of our law, that the learned Counsel for the Applicant should have been unable to support his contention by *dicta*.

The law is careful to insure to the accused due notice of the charge made against him, and of the time and place when and where it will be investigated. If however this warning be disregarded the Magistrate is empowered to proceed to deal with the charge in his absence. It cannot seriously be contended that if, for any cause, the trial cannot be finished on the day, originally fixed, and on which the accused leaves default, notice of the adjourned hearing must be given to the accused—that the power to proceed in the absence of the accused, conferred by Art. 105 lapses unless the cause is disposed of in one way or other during that particular sitting. The terms of the Article, and the principle on which it is based afford no ground for such a contention. But if the trial once begun can, on sufficient cause shown to the satisfaction of the Magistrate, be adjourned and resumed without fresh warning to the accused—upon what ground can it be held that, if in the interests of justice, the trial as a whole be adjourned, it is necessary for the regularity of the proceedings that the accused be formally cited for the day fixed ?

We are unable to find in the provisions o our law, in the jurisprudence of our Courts or of those of England, or in principle, any ground for adopting the view urged by the Applicant. On the contrary, we consider that the power conferred by Article 105 to proceed to hear and dispose of the case in the absence of an accused who makes default when duly summoned, necessarily includes a power to adjourn the hearing when that is found to be expedient, and does not render it essential for the validity of the proceedings that notice of such adjournment should be given to the accused.

In these circumstances, and assuming the facts to be as alleged, as we are clear that the principal accused could not successfully have attacked this Conviction, we must hold that the applicant has failed to allege any sufficient ground in law for the issue of the writ craved, and accordingly refuse his motion.

SUPREME COURT.

WRIT OF CERTIORARI—SWINDLING— MANŒUVRES FRAUDULEUSES. ART. 330 OF PENAL CODE.

Held that, if false representations are not sufficient per se *to constitute fraudulent pretences in the sense of Article* 330 *of the Penal Code, they, however, do so, when they are accompanied with any outward fact (fait extérieur) which gives an appearance of truth to them, such as the intervention of a third party, the production of a letter, or more generally, any material act (acte matériel) which strengthens the lies and promises used and induces a belief in them ;*

That, when the facts charged in the information were that the accused, who was master of a merchant vessel that had come to this port with a shipment of guano, had caused sand to be mixed with such guano, in order to increase the amount of his freight, and that, with the view of causing the firm by whom the freight was to be paid to believe that the guano so tampered with was in the same state in which it was when shipped, the accused had presented to the firm in support of his claim a false certificate, as the amount of cargo landed, signed by the chief officer of his ship, such facts constitute fraudulent pretences in the sense of Article 330 *of the Penal Code; the increasing the apparent bulk & weight of the Cargo, and the intervention of the Chief Officer by making the above certificate being looked upon as outward facts which strengthened the false claim put forward by the accused as to his freight, and that therefore such facts could competently form the basis of a charge of attempt at swindling ;*

The Court therefore quashed the Judgment complained of and remitted the case back to the District Magistrate to be proceeded with.

Hon. HENRI ADAM,—Applicant

versus

D'AGOSTINI AND ANOR,—Respondents

Before

His Honor A. G. ELLIS,—Acting First Puisne Judge

and

His Honor Mr Justice E. J. LECLÉZIO,—Acting Second Puisne Judge

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W. NEWTON,—Of Counsel for Applicant
G. KŒNIG,—Attorney for the same
E. PELLEREAU,—Of Counsel for Respondents
E. DUVIVIER,—Attorney for the same

Record No. 20,331

18th July 1879

Under a writ of Certiorari, the applicant has removed into this Court certain criminal proceedings instituted at his instance against the respondents D'Agostini and Peirone, in the Court of the Junior District Magistrate of Port Louis. These proceedings originated in an information charging the respondent D'Agostini with attempt at swindling and the respondent Peirone with being an accomplice in the said crime. Evidence at very great length was adduced before the District Magistrate, who after hearing counsel dismissed the information on the ground that, even if proved, the facts alleged against the accused would not in his opinion have amounted to an attempt at swindling within the provisions of our law.

On the allegation that the conclusion thus come to by the learned Magistrate was bad in law the applicant sought and obtained a writ of Certiorari, and the question which we are now called upon to determine is whether the facts charged in the Information do or do not constitute an attempt at swindling under Articles 2 and 330 of our Penal Code. The elements essential to the constitution of swindling are numerous; but the judgment of the inferior Court bears that the ground upon which, in this instance, the Information was dismissed, is the absence of any averment of facts, which in the opinion of the learned Magistrate amount to "manœuvres frauduleuses." This being the distinct basis upon which the judgment rests, the question upon the answer to which our decision must hinge is limited to determining whether the facts charged against the accused constitute what is qualified "manœuvres frauduleuses" by Article 330.

In the judgment of the Magistrate and in the argument at the bar, the facts of the case as disclosed by the evidence adduced in the inferior Court, were more or less referred to, but, as the objection which has been sustained as fatal to these proceedings, is an objection to the sufficiency of the facts alleged in the Information to constitute swindling—we are clear that, in disposing of the question submitted to us, we must discard from our minds any statements which have been made with regard to the evidence, and strictly confine our attention to the averments of the Information, dealing with the objection in the same way as if it had been taken and sustained *in limine* of the proceedings.

From the terms of the information it appears that the act against which this prosecution is directed "is the employment of fraudulent pretences by the Respondent D'Agostini, to induce the applicant to believe that the cargo of guano landed from the vessel of which D'Agostini is master, was greater in amount than it actually was, and to obtain from them payment of a larger sum than was actually due as freight, freight being, according to the terms of the Charter Party, payable per ton of guano. The information alleges that with this view "the said D'Agostini did present to "one Alcain, the manager of the Guano "Department of the said firm Pipon, Adam "& Co. a note or written statement certified "and approved by one Peirone the Chief "Officer of the said Italian ship which said "note or written statement bore that the "quantity of one million two hundred and "ninety kilograms of guano had been landed "from the said ship, and that the freight "due to the said D'Agostini was to be cal-"culated according to such weight; whereas "in truth and in fact the said D'Agostini "had fraudulently caused sand to be mixed "up with the said guano in the proportion "of about two shovels full of sand to about "four shovels full of guano, while the said "guano was being put into bags on board "the said ship in this harbour, prior to the "guano having been landed; and the said "sand was so mixed up with the said guano "at night; and this was done with a view to "increase the weight of the said guano and "thus augment the amount of the freight to "which the said d'Agostini would be en-"titled."

Such being the facts alleged in the information we must enquire whether or not they amount to "manœuvres frauduleuses" in the sense in which the terms are used by our law in defining the crime of swindling. In determining the meaning of these words, we may naturally refer to the signification which has been given to them by the Courts in France, in construing the terms of Article 405 of the French Penal Code of which, in this respect, our own Article 330 is a textual reproduction. At the argument the history of the jurisprudence of the Court of Cassation was traced with great care and minuteness, but it does not appear to be necessary to refer to more than one or two of the cases cited. The principles resulting from the long series of decisions by the Court of Cassation, appear to us to be accurately and shortly summed up in the following passage from the work of Messrs. Chauveau Adolphe and Faustin Hélie. "Il résulte en même temps "de la jurisprudence, dont les derniers arrêts "ont même aggravé la sévérité sur ce point, "que tout fait extérieur, l'intervention d'un "tiers, la production d'une lettre, une dé-"marche ostensible un voyage prétexté tout "acte matériel en un mot qui vient fortifier les "mensonges et les promesses et faire croire à "leurs assertions par une certaine mise en

" scène d'une action préparée à l'avance, " suffit pour constituer les manœuvres." (Vol. V No. 2205. 5th Edition.)

Does this Information then allege facts which in this sense constitute " fraudulent manœuvres " as having been employed by the Respondent D'Agostini in support of the false claim for freight advanced by him ? We have no hesitation in answering this question in the affirmative. The Court of Cassation has recognized certain categories of facts which advanced in support of and to give an air of credibility to a fraudulent lie, will constitute swindling ; in the present instance we find in the Information allegations which to our minds undoubtedly amount to " fraudulent manœuvres " ; we regard the alleged adulteration of the cargo with sand in the process of bagging, as unquestionally a material act done with the view of supporting the exaggerated claim for freight, and in order to lend speciousness to the foundation of that claim, vizt., the false representations as to the amount of guano landed : and it appears to us that the intervention of a third party for the same purpose is most clearly averred, the Information distinctly stating that the Respondent D'Agostini in support of the claim for freight made by him, presented to the applicant " a note or written state- " ment certified and approved by one Peirone, " the Chief Officer of the said Italian ship " containing a misstatement as to the quantity of guano landed and representing the adulterated contents of the bags as cargo upon which freight was due. In this respect this case appears to us clearly to fall within the principles recognized by the Court of Cassation in the cases of *Fivet* 28th March 1867, Devilleneuve & Carette 1868 I p. 94 and *Cazalet* 5th February 1869, Devilleneuve and Carette I. p. 487.

It seems to us that the erroneous view taken by the learned Magistrate, is the result of his having confined his attention too exclusively to the mere fact of the adulteration of the cargo, and having regarded that as the main fact incriminated in this Information. Thus he states " any person who shall have " mixed gold with an inferior metal and sold " the compound as gold is punishable, not " under Article 405 of the French Penal " Code (330 of our Law) but under Article " 423 (343 of our Law) " adding " I fail to " see any difference between the present case " and the case above cited." Now it may be that if Article 343 of our Law extended to the selling of adulterated guano, and the accused in this instance had been guilty simply of selling this mixture as guano, an information charging him with the crime of swindling would not have lain but this does not ground any just inference with regard to the present case where the facts are an endeavour by the first Respondent to swindle the applicant out of a part of his property by means of a claim for freight which was not due, which claim was supported by the fraudulent manœuvres of increasing the apparent bulk and weight of the cargo landed by mixing sand with it, and of presenting a false certificate as to the amount of cargo landed, signed by the second accused. The basis of the crime charged is not the mixing, but the claim for freight which was not due, a false claim to which the Respondent endeavoured to give the semblance of truth by bagging and landing sand as guano brought from Peru, and by presenting a false certificate as to the amount of guano landed.

We cannot doubt that these allegations if duly established constitute what our Law refers to as " manœuvres frauduleuses," and that the judgment in so far as it dismisses the Information as containing no sufficient averment of this element of the crime of swindling, is bad in law. We accordingly make absolute the rule issued in this case, quash the judgment in so far as complained of, and remit the Information and proceedings following thereon to the Inferior Court, to be further proceeded with in accordance with Law. We also find the Respondents D'Agostini and Peirone liable to the applicant in costs.

SUPREME COURT

CURRENCY OF MAURITIUS—EFFECT OF ROYAL PROCLAMATION OF 12 AUGUST 1876 UPON OBLIGATIONS EXPRESSED IN STERLING IN FORCE ON 1ST JANUARY 1877—ITS EFFECT UPON OBLIGATIONS CONTRACTED SUBSEQUENTLY—CLAIM OF A BILL OF COSTS EXPRESSED IN STERLING AND INCURRED IN ENGLAND AFTER 1ST JANUARY 1877—TENDER OF SUCH COSTS IN RUPEES—PLACE OF PAYMENT.

Held that, according to the 9th & 10th Sections of the Royal Proclamation regulating the currency of Mauritius, sums expressed in sterling under any contract or engagement public or private in force on the 1st January 1877, were, in the absence of any special stipulation, defrayable in rupees at the value in sterling legally attributable to them at that date ;

That according to the 7 & 8 sections of the said Royal Proclamation, sums expressed in sterling in obligations contracted after the 1st January 1877 must be defrayed in Rupees as the only legal tender of payment.

but in Rupees at a rate which was not fixed by the said Proclamation and which might vary according to the circumstances of each case;

That, in this case, the sum tendered by Widow Dioré in Rupees at two shillings per Rupee, was in no sense the equivalent of the amount of the bill of Costs expressed in sterling and due by the Plaintiff, as there was no ground for maintaining that either in law or in fact the Pound sterling was equivalent to ten Rupees;

That the Place of payment was the most important consideration to keep in view in fixing what sum in Rupees was in any particular case exigible in satisfaction of a debt expressed in sterling;

That, as the obligation arose in England' England was the seat of such obligation' and payment must be held exigible, if claimed there, in sterling, or if demanded elsewhere, in currency of that place to such an amount as must be necessary to place the creditors in the same position as if the debt had been paid in England.

The Court therefore dismissed the Summons issued in this case on the ground of the insufficiency of the tender and found the Defendants entitled to costs.

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WIDOW DIORÉ,—Plaintiff

versus

GAUTREAU & Co.—Defendants

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Before

His Honor G. BESTEL,— Acting Chief Judge

and

His Honor A. G. ELLIS,—Acting First Puisne Judge

—

L. ROUILLARD,—Of Counsel for Plaintiff
V. BOULLÉ,—Attorney for the same

L. COX,—Of Counsel for Defendants
F. ROBERT,—Attorney for the same

Record No. 19,673

18*th July* 1879.

In this and six other cases which were argued at the same time, questions arise of very great importance not only to the individual suitors, but also to the general community. All these actions have this point in common that the question at issue in each relates to the manner in which obligations expressed in terms of British or French Currency, are to be discharged under the laws regulating the currency of this Colony; but they arrange themselves in several groups according as the peculiar circumstances of each group or class of cases affect the issues raised. In proceeding to deal with these actions it will greatly conduce to simplicity and clearness, if in the first place, we examine and dispose of the issue raised in so far as it is common to all the suits, and thereafter proceed to consider how the special circumstances of each class of cases affect the decision to be arrived at with regard to that class.

The issue common to all these cases is, what is the true construction and effect to be given to a Proclamation "for the Regulation "of the Currency of Her Majesty's Colony "of Mauritius and its Dependencies," approved and ordered to take effect and to be put in force in the Colony by the Order of Her Majesty in Council of 12th August 1876 which order in Council and Proclamation were brought into force and effect in this Colony on 1st January 1877, in virtue of the Proclamation of His Excellency the Governor, (Number 28 of 1876), dated 25th November 1876? With reference to the construction of the Royal Proclamation, which now regulates the Currencyof the Colony, the decision of these suits involves the determination of two most important questions vizt:

1o. The effect of the Proclamation upon obligations, expressed in sterling, which were in force at the date when it came into operation, and

2o. Its effect upon obligations, so expressed, which were contracted subsequently.

Before applying ourselves to these questions, it will be advantageous to review very briefly certain enactments which had been passed by the Colonial Legislature shortly before the promulgation of the Order in Council and relative Proclamation. The first of these is Ordinance No. 30 of 1875 which was put in force on the 5th October of that year. Prior to the passing of this Ordinance, the Currency of the Colony consisted partly of the current coin of the United Kingdom, and partly of the gold and silver coin current in the Territories of the East India Company or of gold and silver coin of Foreign states. By order in Council, dated 1st February 1843, Her Majesty, with the advice of Her Privy Council, approved of, and ordered to be put in force in the Colony (as was sub-

sequently done) a Proclamation fixing the rates at which these Foreign coins, and coins of the East India Company's Territories were to pass current in the Colony. It was provided *inter alia* by this Proclamation that the Rupee should circulate and be received as the legal equivalent of one shilling and ten pence sterling. This being kept in view, the object contemplated by the Legislature in enacting Ordinance No. 30 of 1875 appears very clearly from the preamble of that measure. Shorn of its technicalities, the preamble narrates that, by long established usage, the Rupee had come to be regarded as the equivalent of half a dollar or two shillings sterling; that all engagements had been expressed in Dollars or Pounds, and defrayed in Sterling or Rupees at the above rate, and that great injustice would be done, and danger occasioned to the financial and commercial operations of the Colony if the Rupee were not made a legal tender at the rate mentioned. On this preamble the Ordinance enacts that (Art. 1) the Rupee shall be the legal standard of value, and that (Art. 2) the Rupee, its silver subdivisions and British Silver Coins of the United Kingdom "shall in the Colony "be the only legal tender of payment in coin" for sums exceeding one shilling. It was assumed throughout the argument in these cases, and was not disputed, that the Ordinance fixed the legal value of the Rupee at two Shillings Sterling. The Ordinance contained further clauses, exempting from its provisions Notes of the Commissioners of Currency; regulating the discharge of obligations in force when it came into operation; and fixing the value of copper, bronze, and small silver coins.

From what has just been said, it will be seen that the object of this measure was to safeguard the community from a financial crisis which it was apprehended might arise from the almost entire withdrawal from circulation of british silver, coupled with the fact that the rupee (which had become practically the sole circulating medium) had, by usage, acquired a conventional value greatly in excess of the legal value assigned to it by the order in Council of 1843. The way in which this object was sought to be effected was by rendering the rupee the legal standard of value, by declaring that, together with british silver coins the rupee should be the only legal tender of payment in coin; and by legally assigning to it the conventional value which it was said to have acquired as the equivalent of two shillings sterling. The enactment by which this was done was however to be merely a temporary expedient, and accordingly it was provided (Article 10) that the Ordinance should have force during six months only, which period the Governor was empowered by Proclamation to extend to one year. While the enactment remained in force, it was provided (Article 8,) that all Ordinances Proclamations and Laws contrary to its provisions were suspended, in so far as inconsistent therewith.

In March 1876 His Excellency the Governor (Proclamation No. 4) exercised the power vested in him and extended the operation of Ordinance No. 30 of 1875 for the prescribed period of 6 months from 8th April 1876. In September of the same year, Ordinance No. 22 of 1876 was published, by which Ordinance No. 30 of 1875 was continued in operation until 7th April 1877, subject to a power conferred on the Governor to deprive it of force and effect at any prior date, by Proclamation.

In the meantime, the subject of the Currency of the Colony had been engaging attention at home, and, as already stated, the Order of Her Majesty in Council and relative Proclamation was, on 25th November, published and ordered to come into force and effect from and after 1st Jannary 1877. The provisions contained in this Proclamation were undoubtedly intended to supersede Ordinance No. 3 of 1875, and permanently to regulate the difficulties which had led to the introduction of that enactment as a temporary expedient. For some unexplained reason, however, it was not until 20th March 1877, that, in virtue of the power vested in him, the Governor declared that, from and after 1st January 1877, the Colonial Ordinance had lapsed and ceased to have force and effect.

Having thus briefly reviewed the state of the Colonial Legislation prior to the coming into operation of the Royal Order, we shall now proceed to examine the provisions of this measure with a special view to the solution of the two questions already referred to vizt. its effect (1) upon current obligations expressed in sterling, and (2) upon such obligations contracted subsequently.

The first five Sections of the Proclamation, annexed to the Order in Council of 12th August 1876, narrate the various existing Royal Proclamations relative to the Colonial Currency, and, by Sect. 6, these are one and all revoked and annulled in so far as applicable to this Colony, it being provided that the revocation shall take effect "from and after a day "to be fixed by the Governor by Proclama- "tion." This date is a point of vital importance with reference to these cases, and it admits of no doubt that it is the same as that referred to in Section 9 of the Proclamation as "the date asaforesaid of the bringing into

" operation of this Proclamation " which, as we have seen, was the 1st January 1877. Having thus provided for the revocation of the existing Imperial measures affecting the Currency of the Colony, the remaining 5 Sections of the Proclamation contain the provisions which are in future to regulate this most important subject.

By Section 7 it is declared that " from and " after the same date " that is 1st January 1877 " the silver rupee of India and its silver " subdivisions of proportionate intrinsic value " shall be the only legal tender of payment, " except as hereinafter directed, within our " Colony of Mauritius and its Dependencies."

Section 8 specifies the exceptions just referred to, and declares, 1st that " British " copper " and bronze *tokens* at present in " circulation shall be a legal tender of pay- " ment for any sum not exceeding half a " Rupee " at rates detailed in cents of a rupee — and 2nd that silver, copper, and bronze *tokens*, to be specified by the Governor by Proclamation, shall be a legal tender for such sum not exceeding 5 Rupees as may be named in the Proclamation.

In connection with the cases now before us, as the points which it is important to notice, in connection with these sections, are 1st. that since the 1st January 1877 the Rupee and its silver subdivisions of proportional intrinsic value have been the only legal tender of payment for sums exceeding 5 Rupees, and 2nd that no value is given to the Rupee, either as regards sterling or as regards any other Currency system.

Sections 9 and 10 contain provisions designed to safeguard existing interests.

The former (Section 9) declares that " when- " ever the Denomination of British Currency " shall have been specified in any Regulation, " Ordinance, Proclamation, Minute, Notifi- " cation or Contract in force at 1st January " 1877." " Whether as payments to be " made to or by the Government of Mau- " ritius, or by any other persons, such sums " shall continue as heretofore to be received " and paid at the rate in force " on that day. It is somewhat difficult to understand the principle of Selection which has governed the formation of the list of documents specified in this Section, but probably the enumeration is borrowed from Ordinance No. 30 of 1875, where the same documents are mentioned in the same order. A similar difficulty seems to exist in determining the precise meaning of the words " payments to be made " to or by the Government of Mauritius, or " *by any other person* " the payments " by *any other person* " referred to are, presumably, not payments to Government as such payments are included in the previous words, they must therefore refer to payments to some other person, and in that case we would have expected the final clause to run " *or to* " *or by any other person.*" But, however that may be, it appears plain that the section relates, if not exclusively, at least mainly to payments of sums expressed in Sterling falling to be made under any law, enactment or public document in force on 1st January 1877. These payments it is declared " shall continue as heretofore to " be received and paid at the rate in force " at that date. It is to be noted that this section does not expressly provide for these payments being made in Rupees, but merely " at the rate in force." What was meant by these words is not free from doubt; but, after most careful consideration, we incline to hold that this clause must be construed as if it had read " shall continue as " herefore to be received and paid " *in Rupees* " at the rate in force at the aforesaid date." It is to be remarked indeed. that these words appear to have occasioned difficulty in the minds of those who drew up the Proclamation of 26th November 1876, by which the Order in Council and relative Proclamation was put in force, and to have led to the insertion therein of the following clause. " I " (i.e. the Governor) " do hereby " further order and proclaim that, as pres- " cribed by paragraph 9 of the said Order in- " Council (*sic*), all taxes, duties, fees, fines, " and penalties specified in terms of British " Currency in any Ordinance, Proclamation, " notification, or Contract at present in force " until further orders (shall) continue to be " levied and collected as heretofore, and at " the rates fixed in such Ordinance &c. or " Contract." The construction thus placed upon the clause however, is not authoritative, and neither harmonizes with, nor renders intelligible, the terms used in this clause of the Proclamation.

The 10th Section of the Proclamation declares that " all other contracts and engage- " ments expressed in terms of British money " in force on 1st January 1877 and payable " in our said currency shall be defrayable in " Rupees at the above rate, unless such con- " tract or engagement shall contain any " special provision or agreement to the con- " trary." The meaning of this clause is abundantly clear. It ordains that sums payable in sterling under contracts or engagements, (other than those referred to in the preceding section) in force on 1st January 1877, shall, in the absence of a special pro-

vision to the Contrary, be defrayable in Rupees "at the above rate," that is (section 9), "the rate in force at the aforesaid date,"—in other words in Rupees, estimated at the value in Sterling legally attributable to them at the date when the Proclamation was brought into operation.

The only remaining provision in this Proclamation (section 11) declares that sums expressed in dollars in any Contract, agreement, or undertaking, entered into prior to 1st January 1877, shall be legally discharged by the payment of two rupees for each dollar due.

From this examination of the Royal Proclamation, it will be seen that it differs in certain material points from the Colonial enactment which it superseded. It was contended at the bar that it was in the main a re-enactment of the Ordinance,—a re-enactment made in order that the Currency of the Colony might continue as heretofore to be regulated, not by any local measure, but by a Royal Order. Such a view however we cannot for one moment admit. The provision of the two enactments were both designed to meet the same emergencies, but the modes in which they effect their purpose, are most widely different. The most material differencies in the remedy provided by these measures respectively, so far as the subject in hand is concerned, are 1st that, whereas the Colonial Ordinance contemplated a system in which British silver coin should continue to be a legal tender along with the Rupee,—the Royal Proclamation renders the Rupee the sole legal tender, and 2nd, whereas the Ordinance appears to ascribe to the Rupee a value in Sterling, the Proclamation, while allowing that correlative value to exist *quoad* existing obligations, ascribes to it no value whatever as regards subsequent transactions. These differences establish a most radical distinction between the two systems and vitally affect the answers to be given to the two questions which, as we have said, underlie all these cases.

These questions are 1o. What is the legal effect of this Proclamation on the construction of obligations expressed in sterling in force at the date when it came into operation, that is on 1st January 1877, and 2o. What is its effect upon such obligations contracted subsequently. The answer to the first question is to be found in the provisions of the 9th and 10th Sections, and must be, that sums expressed in sterling under any contract or engagement public or private in force at that date, are in the absence of any special stipulation, defrayable in rupees at the value in sterling legally attributable to them at that date. The answer to the second question again, is to be sought in Sections 7 and 8 of the Proclamation, and must be, that sums expressed in sterling in obligations contracted after 1st January 1877 must be defrayed in rupees as "the only legal tender of payment," but in rupees at a rate which is not fixed by the Proclamation, and the mode of determining which, in various circumstances, will form the subject of our consideration in proceeding to deal with each of the class of cases now before us.

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WIDOW DIORÉ,—Plaintiff

versus

GAUTREAU & Co.,—Defendants

—

In this case Widow Dioré was, by a judgment of the Judicial Committee of the Privy Council of 11th July 1877, pronounced in an appeal at her instance from a judgment of this Court, ordered to pay the Respondents Messrs. Gautreau & Co., "the sum of Five Hundred and Sixty Pounds, twelve Shillings and eight pence Sterling for the Costs" of the appeal. The judgment of the Privy Council was read. and execution ordered by this Court on 28th August 1877. In satisfaction of the amount so due by her, Widow Dioré tendered a sum of Rs 5,606.32 c., (a sum calculated on the footing of R. 1, being the legal equivalent of 2 Shillings Sterling), and, this tender having been refused by Messrs. Gautreau & Co., she deposited the amount in the Registry of the Court, and took out a Summons, calling upon the Defendants to show cause why the tender should not be "declared sufficient, good and "valid to all intents and purposes, and the "plaintiff duly discharged of her debt."

The special question raised by this case therefore, is, whether in satisfaction of a debt due under a judgment of the Privy Council, expressed in Sterling, the Rupee is to be estimated as being the equivalent of two Shillings Sterling, and whether the tender of a sum calculated on this footing is a tender "de la "totalité de la somme exigible" (C. C. Art. 1251 § 3). The obligation which we are now called upon to construe arose subsequently to 1st January 1877, and after the Ordinance No. 30 of 1875 had lapsed—that is, at a time when the Rupee bore legally no relative value as the equivalent of any sum in Sterling money, and is created by the judgment of an English Tribunal. That judgment was undoubtedly final, and our duty is confined to determining what sum, in the Currency of

the Colony, is the equivalent of the amount in sterling mentioned therein.

We have no hesitation in holding that the sum tendered is in no sense the equivalent of the amount awarded by the Privy Council. There is absolutely no ground for maintaining that either in law or in fact the pound sterling is equivalent to Ten Rupees.

In fixing what sum in rupees is, in any particular case, exigible in satisfaction of a debt expressed in sterling, the first and most important consideration is the place of payment. This obligation is one, as we have seen, which arose in England, the cause of the obligation is the costs incurred in resisting an appeal there, and the judgment contains no specification of any place where the obligation is exigible. In these circumstances, we have no doubt that, on the principles applicable to the construction of such contracts, England must be deemed to be the seat of the obligation, and payment must be held to be exigible, if claimed there, in sterling, or, if demanded elsewhere, in Currency of that place to such an amount as is necessary to place the creditors in the same position as if the debt had been paid in England. *Cash* v. *Kennion* II Vesey p. 314, Burge, *Commentaires on Colonial and Foreign Law* III p. 771—3. *Dufau* v. *Deymié*, see Dalloz Repertoire *voce* " Obligation " No. 1755.

It is true that this order was made in an appeal against the judgment pronounced in a suit between parties in this Colony, and, had our Law assigned to the Rupee a relative value to sterling, a question might possibly have been raised as to what would have been due satisfaction of this award of costs. But, as no such value is given to the rupee, we are clear that the terms of the order can only be construed in the sense above indicated.

We shall accordingly dismiss this summons, on the ground of the insufficiency of the tender made by the Plaintiff, and find the Defendants entitled to costs.

SUPREME COURT

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CLAIM OF A BILL OF EXCHANGE EXPRESSED IN STERLING—ACCEPTANCE OF THE BILL IN MAURITIUS—SEAT OF OBLIGATION—WHAT LAW TO BE APPLIED—ROYAL PROCLAMATION OF 12 AUGUST 1876. VALUE OF RUPEES.

Held that the Defendants having accepted in Mauritius the Bill of Exchange due by them to the Plaintiffs, and no specific place of payment having been mentioned in such Bill of Exchange, there was no doubt that the Contract must be regarded as one entered into and to be performed in Mauritius, and that the law of the Colony must regulate the payment ;

That by the law of Mauritius no fixed value having been assigned to the Rupee, it could not be considered as the legal equivalent of two Shillings sterling with regard to obligations expressed in sterling and in force after the 1st January 1877 *;*

That neither according to the current rate of exchange, nor according to the par of Exchange between Rupees and Sterling Money, had the Rupee that value ;

The Court therefore considered that the Defendants had not made an adequate tender in Rupees for the sum due by them in sterling, and found for the Plaintiffs with Costs.

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THE CHARTERED MERCANTILE BANK,—Plaintiff

versus

SCOTT & Co.—Defendants

—

Before

His Honor N. G. BESTEL,—Actg. Chief Judge

and

His Honor A. G. ELLIS,—Acting First Puisne Judge

—

P. L. CHASTELLIER,—Of Counsel for Plaintiff
E. DUVIVIER,—Attorney for the same.

G. GUIBERT,—Of Counsel for Defendants
J. GUIBERT,—Attorney for the same.

Record No. 20,183

18*th July* 1879

In this case the plaintiffs claim from defendants payment of £150 sterling due under a Bill of Exchange,—in favor of the City Bank or Order and endorsed to the plaintiffs,—drawn on the Defendants by Messrs. Jate Brothers of Sydney, and duly accepted by

the defendants—together with interest from the date of payment. In satisfaction of the debt so constituted the defendants tendered Rs 1500, and, their tender having been refused, deposited the amount in the Registry of this Court, and obtained leave to defend to the action.

The question raised by the suit is therefore at what rate Rupees are to be estimated in satisfaction of a debt due under a Bill of Exchange expressed in sterling.

The first point which presents itself for consideration is : what law is to be applied in construing the obligation ? The contract now sought to be enforced is one, which by their acceptance, the defendants entered into, binding themselves to pay the plaintiffs, as endorsers of the *Bill*, the amount therein specified. The acceptance having taken place in Mauritius and no specific place of payment being mentioned, there can be no doubt that the contract must be regarded as one entered into and to be performed in Mauritius, and that, in accordance both with the English and with the French authorities, the law of this Colony must regulate the payment. Story on Bills of Exchange (2nd Edition) § 164. Phillimore, International law, Vol. IV § 703. *Allen vs. Kemble*, 6 Moore's P. C. Reports p. 321. Pardessus Vol. V § 1495. Foelix (Droit International, Demangeat) Vol. I § 96.

Accepting then the law of Mauritius as regulating what is due payment of this Bill of Exchange, we must enquire, whether, by our law, there is any fixed rate at which Rupees may be tendered as the equivalent of sterling money ? We have seen that, as regards contracts in force at the date when the Order in Council of 12th August 1876 came into effect, Sections 9 and 10 expressly enact that, (in the absence of express stipulation) sums due are defrayable in Rupees at the rate then current, that is on the footing of R. 1 being equal to two shillings sterling. But this obligation is one which arose long after the date when the Order in Council was put in force. As we have said, it has its origin in the acceptance of the defendants, which is dated 18th November 1878. The sections just referred to, do not therefore regulate the payment of this Bill, and if Rupees at the rate of R. 1 to two shillings sterling are a valid tender in satisfaction of the debt due under it, that can only be in virtue of some other provision. We have already pointed out that the Order in Council while providing that (Section 7) the Rupee shall be the only legal tender of payment, does not assign to it any relative value, as the equivalent of sterling, with regard to *future* contracts. There is therefore no positive enactment upon which the defendants can found as rendering the tender made by them, in this case, an adequate and sufficient one.

It was, however, contended that the express provisions of Sections 9 and 10, as to the rate at which Rupees are to be estimated in the discharge of contracts existing when the Order in Council was put in force, furnished an argument by analogy in favor of the same value being assigned to them in construing future contracts. This contention we cannot for a moment entertain. There can be no doubt that the main object of the Order was to put an end to the difficulties and dangers which had arisen from the existing Currency of the Colony, and that this was done by the introduction of the Rupee, as the sole legal tender, and standard of value.

In doing so, however, it became necessary to make special provisions with regard to transactions which had taken place or might be entered into, on the faith of Ordinance No. 30 of 1875, prior to the publication of the Order in Council. This was done by Sections 9 and 10 of the Order which expressly enacts that such transactions are to be carried out on the footing, on which they were entered into But with regard to future contracts, no such provision is made as it was an essential element of the new system of currency that no fixed relative value in sterling should be assigned to the Rupee. Far therefore from affording an argument by analogy, these sections furnish the strongest argument against the contention of the defendants embodying, as they do, the exceptional rule which was to regulate the discharge of contracts which, having been entered into under the existing law, could not equitably fall under the amended system of Currency introduced by the Order in Council.

It was further contended that, by the usage of the Colony, the Rupee had acquired a fixed value as the equivalent of two shillings sterling. In support of this contention, reference was made to the preamble of Ordinance No. 30 of 1875, and to public discussions which took place prior to the introduction of the Order. With reference to this argument, it is sufficient to say, that, the Order in Council was framed and promulgated for the express purposes of obviating the evils resulting from the fictitious value which, by usage, the Rupee had acquired, and that, were we to regard the usage existing at the time when the Order in Council was promulgated as giving to the Rupee a tender value of two shillings sterling, we should thereby

import into the enactment a provision which it does not contain, render it utterly inoperative, and frustrate the very end which it was intended to accomplish.

We are therefore clearly of opinion that, by our law, no *fixed* value is assigned to the rupee as an equivalent to sterling money, and we must now proceed to enquire, what principles are to regulate the payment in rupees, of a debt expressed in sterling. The Plaintiffs contended that payment must be made according to the Current Rate of Exchange, while the Defendants, on the other hand, maintained that the par of exchange was the basis to be adopted in estimating the value of the rupee. It does not admit of dispute that, if the debt sued on here is payable in rupees at the Current Rate of Exchange, the tender made by the Defendants is inadequate. If therefore the tender made by the Defendants is a sufficient answer to the demand, it must be on the ground that they are entitled to pay in rupees at the par of exchange: Assuming for the purposes of argument that this is so, is the amount tendered, Rs 1500, the legal equivalent of the amount due, £ 150 sterling, estimating rupees at the *par* of exchange?

In answering this question it is essential to determine what is to be deemed the *par* of exchange in this Colony. In some countries there is a fixed or nominal *par* of exchange. Thus, in the United States, the pound sterling is valued at $4.44c., and in Jamaica, at £1.4 Jamaica Currency. With us however, as the rupee bears no fixed relative value to the pound sterling, the Defendants contended that we must have recourse to the real *par*, that is to say, the relative intrinsic value of a rupee to a pound sterling, and they further maintained that, in estimating the *par* of exchange we must adopt as a basis the relative intrinsic value of a rupee to a shilling, and alleged that, if this view be adopted, the sum tendered by them is more than the equivalent of the debt due under the Bill of Exchange.

We have carefully examined this contention, but, assuming for the sake of argument, that in satisfaction of the debt due by them, the Defendants are entitled to tender rupees at *par* of exchange, we cannot accept the mode suggested by the Defendants, as that by which the *par* of exchange between rupees and sterling must be determined. Under the sterling system of currency, the standard of value is gold, the pound sterling being equal to twenty one-twentieths of a guinea, and the value of the shilling depends, not on the amount of silver which it contains, but upon its being a legal tender (to a limited extent) for the one ($^1/_{20}$) twentieth part of a pound. In determining the *par* of exchange between two currencies the standard of value of one of which is gold, and of the other silver, one most important element is to be found in the variations in the relative values of these metals. Were we, however, as suggested by the Defendants, to take as our basis in fixing the *par* of exchange, the relative intrinsic value of the rupee and the shilling, we should throw out of account this most vital element, and the result reached would be, not the *par* of exchange between rupees and sterling, but between rupees and an imaginary currency—the standard of value of which was the shilling. We must therefore reject the Defendants' contention on this point.

If however, the *par* of exchange is to be estimated by the relative intrinsic value between the rupee and the gold pound sterling, it was not (and could not, we think, have been successfully) disputed by the Defendants that the tender of Rs 1500 made by them is inadequate and cannot be sustained in satisfaction of the Plaintiff's demand.

On the whole matter, therefore, holding as we do, that, by our law the rupee is not the legal equivalent of two shillings sterling, with regard to obligations expressed in sterling and originating after 1st January 1877, and that, neither according to the Current Rate of Exchange, nor according to the *par* of Exchange between Rupees and Sterling, has the rupee that value, we must reject as inadequate the tender made by the Defendants and find the Plaintiffs entitled to judgment as craved with costs.

SUPREME COURT

POLICY OF ASSURANCE ENTERED INTO WITH A COMPANY IN LONDON. PAYMENT OF PREMIUMS EXPRESSED IN STERLING. MODE OF COMPUTATION TO BE ADOPTED IN FIXING THE VALUE OF THE RUPEE. PLACE OF PAYMENT. CONSTRUCTION OF CONTRACT. PRESUMED INTENTION OF PARTIES.

Held that the Contract embodied in the policy of Assurance and entered into between the plaintiff and the defendants, having been made in England, the nature and interpretation of the contract and the obligations arising out of it, must be governed by the law of the place where it was made;

That in the absence of any express provision

in the policy of assurance, and looking at the very nature of the contract, the place of performance was presumed to be the same as that in which the contract was made, and that sums becoming due by either party under the policy would be payable in England in stirling and elsewhere in the currency of the place of payment at the current rate of exchange between that place and England ;

That the plaintiff had failed to prove that the stipulation of the policy requiring payments under it to be made in stirling, had been modified by the mutual consent of parties, in such a manner that either was discharged of his obligation by tendering payment in colonial currency at the rate of one Rupee for two shillings sterling, that therefore this contract must be construed in conformity with the stipulations in the policy ;

The Court in consequence found that the tender made and the sums deposited were insufficient, and dismissed the plaintiff's summons with costs.

—

HEWETSON,—Plaintiff

versus

NORTHERN ASSURANCE COMPANY,

Defendants

—

Before

His Honor N. G. BESTEL,—Acting Chief Judge

and

His Honor A. G. ELLIS,—Acting First Puisne Judge

—

W. HEWETSON,—For himself

P. L. CHASTELLIER,—Of Counsel for Defendants

E. DUVIVIER,—Attorney for the same

Record No. 19,897.

18*th July* 1879.

The class of cases to which we shall next turn our intention involves the determination of the mode of Computation to be adopted in fixing the value of Rupees tendered in payment of premiums, expressed in Sterling, due upon a Policy of Assurance granted by the Northern Assurance Company in favour of Mr William Hewetson.

The Plaintiff contends that, in satisfying premiums due under the Policy, he is entitled to pay in Rupees estimating each Rupee as equivalent to two shillings Sterling, and tendered payment on the footing of a half yearly instalment of premium. This tender the Defendants refused on the ground that they are entitled to payment at the rate of Exchange Current when the premium became due. The Plaintiff has accordingly deposited in the Registry of this Court the sum tendered, and has summoned the Defendants to appear and show cause why the sum deposited should not be held to be the amount justly due by him " under the arrangements " made between parties." The same course has been followed with regard to two other half yearly instalments of premium which have since become due, and, with regard to these payments, summonses containing similar conclusions have been served on the Defendants. As our decision in one instance will govern all three suits, it will be sufficient for us to deal with the question as raised on the first summons.

The Defendants are a Company incorporated by Act of Parliament, carrying on business as a Fire and Life Assurance Company, and having an office in London. In 1869 Mr Henry Mercer was the Agent in Mauritius of this Company. The Power of Attorney held by Mr Mercer, as such Agent, has not been produced, but its terms may be inferred with sufficient clearness from documents which have been submitted to the Court. In December of that year the Plaintiff applied to Mr Mercer with the view of effecting a Policy of Assurance on his own life, and furnished the documents and certificate required in such cases. In a letter dated 14th January 1870, (called for and produced by the Plaintiff) Mr Mercer communicated the proposal to the Manager of the Company in London, and informed him that the first half yearly premium having been paid, the Plaintiff had received the usual interim receipt, but that as Mr Hewetson was about to visit Europe for an uncertain period, " he requires that one *per cent* " climate risk should be deducted from his " future payments for such time as he is " not resident in the tropics ; adding " should " this not fall within the scope of your regu- " lations he (Mr Hewetson) requests that you " will consider his proposal as cancelled." The Interim Receipt referred to is as follows : " A proposal by William Hewetson Esqre.

" for an Assurance of £ 10000 on the life of " himself having been made to the Northern " Assurance Company thro' its agent in " Mauritius, I, as such agent, in virtue of the " powers conferred on me by the Directors of " the said Company in London, hereby un- " dertake and engage that, in the event of " the said proposal being accepted by the " said Directors, the risk of the Company " shall be held to have commenced from the " date hereof, and that, should the proposal " be declined by the Directors or only accept- " ed with an addition to the ordinary pre- " mium, the amount of which £ 238. 6. 8 has " this day been deposited with me, the whole " amount so deposited shall be repaid to the " said William Hewetson." This receipt is drawn up on a printed form, the name, sums, date being filled in in writing and is signed by Mr Mercer. It was admitted by the Defendants that the amount mentioned as deposited by the Plaintiff was paid by a cheque drawn in Dollars on the footing of $ 1 equivalent to 4 s. sterling.

The proposal was in due course accepted by the Directors in London, and a Policy, in the ordinary form, drawn up and executed in London on 16th February 1870. The Policy bears to be in favor of " William Hewetson, " Port Louis, in the Island of Mauritius, " Solicitor " ; the sum assured is stated to be " ten thousand Pounds Sterling ", and the amount of the half yearly premium " one hundred and eighty eight Pounds Sterling " ; and on the narrative that Mr Hewetson " has paid the premium of the Assurance until 17th June 1870 ", the sum assured is declared to be payable should he die at any time before that date.

The first question arising for our consideration is, whether the Contract thus entered into is to be regarded as having been made in Mauritius or in England. We have no hesitation in holding that in this case the *locus contractus* was England. The Authorities are clear upon this point : *Story Conflict of Laws* § 285. *Fœlix " Droit International by Demangeat Vol I* § 105. The proposal of Assurance was indeed made by the Plaintiff to the Company's Agent in Mauritius, but it is abundantly clear that (whatever his powers may have been) the proposal was not accepted by him, on behalf of the Company, but was merely received for the purpose of being forwarded for acceptance by the Board of Directors in London. This results from the terms of the Interim Receipt granted by Mr Mercer and accepted by the Plaintiff, and is made still more clear by the letter which Mr Mercer wrote when forwarding the application, which expressly states that the proposal was qualified by a special condition. With regard to the Company's consenting to accept reduced payment during the Plaintiff's absence from the tropics, the Plaintiff contended that the Policy must be regarded as being merely the formal expression of a Contract entered into in Mauritius between him and the Company represented by their Agent here and embodied in the Interim Receipt. We cannot however accept this view. The receipt was merely an engagement that, if the proposal were accepted by the Company the Policy should run from its date, and that, if it were declined, the money deposited should be returned, but did not give rise to any Contract of Assurance between the Plaintiff and the Defendants. Prior to the acceptance of the proposal and execution of the Policy, no claim for payment of the sum assured could be grounded on the Receipt ; after acceptance, such a claim would have arisen under the Policy and *not* under the Receipt. The Contract embodied in the Policy of Assurance having been made in England, the general rule is that, the nature and interpretation of the Contract and the obligations arising out of it, will be governed by the Law of the place where it was made, that is, by English Law. This principle is recognized both by French and English authorities—*Fœlix, Droit International (Demangeat) Vol. I* § 96. *Story Conflict of Laws* § 342, 278. *P. & O. Steam Navigation Company versus Shand Piston* 1865 *p.* 161. This being so, payments falling due under the Policy, and therein stipulated in Sterling, must be presumed to be payable in Sterling if made in England, or, if made elsewhere, in current coin at the rate of Exchange of the day between the place of payment and England. *Phillimore's International Law Vol* 4 § 722. *Story, Conflict of Laws* § § 309, 310. *Scott versus Bevan* 2 *Barn : & Adolphus p.* 78 *Cash versus Kennion* 11 *Vesey p.* 314.

It was contended by the Plaintiff that no place of payment having been mentioned in the Policy and the Assurance having been effected on the life of a person resident in Mauritius, the parties must be held to have contemplated Mauritius as the place where the Contract was to be performed, and that in accordance with the authorities the payments on either side must be regulated by the Laws of the Colony. No doubt if the *locus solutionis* of this Contract be Mauritius, the obligations to which it gives rise must be governed by the Law of Mauritius. *Fœlix Droit International (Demangeat) Vol I* § 98 *Phillimore, International Law Vol* 4 § 673, 693. *Robinson versus Bland* 2 *Burrows p.* 1077-78. But we cannot adopt the view that the place of performance of this Contract is

Mauritius. In the absence of any express provision, the place of performance is presumed to be the same as that in which the Contract is made. *Story, Conflict of Laws* § 242, 317. *Donn versus Lippmann, 5 Clark and Finelly.* But, not only does the Contract not specify Mauritius as the place of performance, its peculiar nature is adverse to the supposition that on entering into it, the parties contemplated Mauritius as the *locus solutionis.* As we have seen, the Plaintiff in applying for a Policy on his life, expressed his intention shortly to leave the Colony for an indefinite period. Further (in view of the four conditions endorsed on the Policy) the residence of the Plaintiff in Mauritius would have voided the Contract, and it was only in virtue of a special clause and consideration of an *extra* premium that he obtained permission to reside here. From this it follows that neither the Plaintiff nor the Defendants in entering into the Contract regarded Mauritius, or any other place, as the fixed and unalterable residence of the Plaintiff, and it cannot therefore be supposed that they intended that the obligations arising out of the Policy should be left to be determined by the Law of Mauritius or any other place in which the Plaintiff might be residing for the moment. We must accordingly hold that the very nature of the Contract gives additional force to the presumption that no place of performance being mentioned, the Contract is to be governed by the Law of the place in which it was made, in virtue of which as we have seen sums becoming due by either party under the Policy would be payable in England in Sterling and elsewhere in the Currency of the place of payment at the current rate of Exchange between that place and England.

But, assuming that under the Contract as entered into, sums due under the Policy were exigible in Sterling or its equivalent, the Plaintiff contended that the mode in which payments have been made and accepted, has modified the Contract in this respect, and shows a mutual agreement between the parties to accept payments in Mauritius Currency at a fixed rate. In support of this pretention, the Plaintiff alleged that from the outset and until June 1877, the half yearly premiums had been paid by him and accepted by the Company until 1875, in Dollars at four shillings, and subsequently in Rupees at two shillings, and that the surrender value of a Bonus accruing to him under the Policy in 1876 was paid by the Defendants on the same footing.

As the basis of all recognized general rules with regard to the construction of Contracts is to be found in the presumed intention of parties, it cannot be doubted that if it can be shown that the parties have uniformly and mutually adopted a construction different from that which would otherwise have been assigned to the terms used, the fact is of vital importance and may render inapplicable the general principles of construction. Thus, if it can be established here that the Plaintiff and Defendants mutually agreed that all sums payable under this Policy should be paid, not as stipulated, in Sterling, but in Colonial money at a fixed rate, that would most materially affect the decision of the question at issue. But it is clear that the burden of proving any departure from the express terms of the agreement, must rest upon the person founding on it, and that he will be bound to show that the alleged modification was mutually consented to by the parties.

We shall now proceed to examine whether the facts founded on by the Plaintiff necessarily imply the existence of a mutual agreement to modify the natural construction of the Policy in the sense indicated. It is not disputed by the Defendants that, from the outset until June 1877, the half-yearly premiums payable by the Plaintiff under this Policy of Assurance were paid by him and accepted by them at first in Dollars at the fixed rate of $ 1 for four shillings, and subsequently in Rupees at the rate of R. 1 for two shillings. Throughout the period in question, from 1869 to 1877, exchange between this Colony and England was always against the Colony, and a statement put in by the Clerk of the Defendants' Agent here, shows that a loss varying from 1 o/o to 13.02 o/o was invariably sustained by the Company in respect of the remittances made to them. From 1871 to the middle of 1872, the rate of premium gradually fell from 5 o/o to 1 o/o but, from the latter date, there has been a continual rise in the rate of exchange, until in June 1877 it reached 13.02 o/o. It appears that, early in 1876 (when exchange on England was at a premium of 9 o/o, the attention of the Company was drawn to the serious loss arising from the high rate of premium charged on remittances, and that they instructed their Agent, Mr. Wiehé, to endeavour to effect a change in the mode of payment of premiums. In reply to these representations (Letter dated 25th May 1876, addressed by Mr. Wiehé to the London Manager, and put in evidence by the Plaintiff) Mr. Wiehé writes that "the writer who "effected the Assurance was under the im- "pression shared by both the assured that "the premium, and in case of death the "amount of the Policies were both to be paid "here, without reference to the rate of Ex- "change on London," but that, in accordance

with the instructions given him, he had written the Plaintiff enquiring if he had any objection to take in future the risk of Exchange being in his favor or against him. The reply made by the Plaintiff to this communication is not before us, but there is no doubt that he declined to accede to this proposal. In the course of 1876, a *bonus* was declared by the Company, and, in reply to an application for payment of its surrender value made to the Company by the Plaintiff's London Correspondents, their Manager wrote (Letter of 14th December 1876) offering payment of the amount £ 439.19.5, less the then Current discount rate of Exchange on Mauritius "as "Mr. Hewetson can only claim to be paid in "dollars at the fixed rate of four shillings." The Plaintiff's Correspondents, after some hesitation, accepted payment on this footing, granting in return a receipt qualified by the words "the question of Exchange being reserved." This arrangement did not suit the Plaintiff, and, in reply to representations made by him, the Defendants' London Manager wrote to him, on 8th March 1877, pointing out that the mode of payment of premium adopted by the Plaintiff was not in accordance with the terms of the Policy, and the wishes of the Directors, that, on the representation of their Mauritius Agent that it had been understood when the Policy was entered into that all payments under it should be made in Dollars at four shillings, and out of consideration for the Plaintiff's wishes, they had refrained from exercising their strict rights, and accepted payments of premium and made payment of the surrender value of the recent Bonus upon that footing; but that, to avoid all future misunderstandings, they required that, if the Plaintiff desired to continue to pay premiums in Dollars at four shillings, he should sign an agreement by which all payments *on either side* should be made at that rate. Further Correspondence was exchanged between the parties without any arrangement having been come to. The Plaintiff continued to pay in Dollars and subsequently in Rupees as the equivalent of four shillings and two shillings respectively, but refused to sign the agreement above referred to, unless, in the first instance, the amount of Exchange deducted from the surrender value of the Bonus accruing on the Policy in 1875 were paid to him. At length, in December 1877, the Defendants' Agent in accordance with his instructions refused the Plaintiff's cheque for Rs. 2383.32 c. in payment of a half yearly premium of £ 238.6.8 due on 17th December 1877, and the Plaintiff forthwith deposited the amount in the Registry of the Court and instituted the present proceedings.

Such being the main facts in this case, as appearing from the documents put in evidence, and the deposition of the witnesses examined by the Plaintiff, we have now to determine whether they bear out the Plaintiff's contention that the stipulation of the Policy requiring payments under it to be made in Sterling, has been modified by the mutual consent of parties, in such a manner that either party is discharged of his obligation by tendering payment in Colonial Currency at the rate of R. 1 for two shillings Sterling. With the exception of a *Bonus* accruing in 1870, the surrender value of which, we gather from the documentary evidence, was not claimed by the Plaintiff (and which was not even referred to in the argument before us) the only payments made under this Policy were payments of premium by the Plaintiff. These payments were one and all made in Dollars at the rate of four shillings, and were accepted by the Defendants in spite of the heavy loss which they thereby sustained, in consequence of the unfavorable rate of Exchange. The only inference which could be deduced from this as to the mutual understanding of parties was, that they consented to construe the Policy as if it bore (what in May 1876 their Agent informed them had been the tacit understanding of parties) that *all* payments *on either side* were to be made in Dollars at the fixed rate of four shillings. As a matter of fact, it would seem that it was only about the beginning of 1876, when the rate of Exchange reached a high premium, that the Defendants' attention was called to this matter. But assuming that an inference is to be drawn from their previous acceptance of the reduced sums remitted to them as premium, we are clear that that above stated is the only one which could legitimately be drawn. Their conduct cannot for a moment be regarded as indicating consent, on their part, to accept payment of sums due to them in Mauritius Currency, while continuing liable to make payments accruing under the Policy to the Plaintiff, or at his death to his representatives, in Stirling. Such, however was the construction which the Plaintiff sought to put upon their acquiescence, and his acts show that he only consented to a modification of the terms of the Policy in this sense. In 1876, as we have seen, a *Bonus* fell due and its surrender value was paid by the Defendants to the Plaintiff's London correspondents on the same footing as that on which payments had been made by the Plaintiff to the Defendants' Agent in Mauritius i e such a sum was paid in London as would enable the Plaintiff to receive in Mauritius the amount in Dollars at the rate of $ 1 for four

shillings. If the Plaintiff had consented to the only modification which the Defendants can legitimately be presumed by their conduct to have assented to—a modification in the mode of making payment under the Policy on both sides—he could not have objected to this way of paying the *Bonus*, but he did object, and claimed payment of the full amount without deduction on account of Exchange, showing clearly that, as to his rights, he adhered to the strict terms of the Policy and construed it as entitling him to exact payment in Sterling of all sums accruing to him under it. He endeavoured to explain this away by stating that, though prepared to accept the surrender value in Dollars *if paid in Mauritius*, yet, having been obliged, owing to the Defendants' Agent not having funds to meet the *Bonus* to refer the matter to his correspondents at home—he considered himself entitled to demand payment in London in Sterling. But such a pretention will not bear the test of examination. If all sums under the Policy were by mutual consent payable in Colonial Currency, all that could be demanded whereever the claim was made, was such a sum as would put him in a position to receive the amount due in Dollars, in Mauritius and, in claiming the surrender value in sterling, he can only be regarded as having asserted a right to be paid in accordance with the express terms of the Policy that is, as adopting one rule of Construction with regard to payments *by* him, and another as to payment *to* him. It is suggested that, having failed to receive on demand the surrender value in Dollars in Mauritius, and having to claim it at home, the difference between Dollars and Sterling was merely an adequate return for the inconvenience and expense to which he had thereby been put. We are far from satisfied that he was entitled to payment of the surrender value of the *Bonus*, until after due intimation to the London office of his intention to surrender. From the documents produced, it would rather appear that, on the occasion of the former *Bonus* being declared, he elected that the sum accruing on his Policy should be dealt with otherwise, and, this being so, until the Company had been warned that he intended to claim the surrender value of this *Bonus*, it may be questioned whether they were bound to make a remittance in order to put their Agents in funds to pay him the surrender value. But, however that may be, the only claim which the Plaintiff could have founded upon the failure of the Defendants' Agent to pay immediately, was one for interest. And the amount which he would thus have been entitled to receive, was quite out of all proportion to the difference between the surrender value of the *Bonus* in Sterling and in Mauritius Currency.

It would appear that the attitude adopted by the Plaintiff had put the Defendants on their guard, and had shewn them the danger which they ran of claims being made by the Plaintiff, or his Representatives, for payment of sums due by the Company in Sterling in spite of the supposed understanding of parties at the date when the Policy was effected. They accordingly, in their letter of 8th March 1877, intimated that continued payment of premiums in Dollars would only be accepted on a written agreement being signed by the Plaintiff, altering the stipulation of the Policy that sums due under it shall be payable in Sterling. This we can only regard as a most reasonable demand on their part. They had been laid to believe that, by a tacit understanding, the Policy was to be construed as if all payments had been expressed in Dollars. On this footing, they have continued to accept payment of premiums in Dollars, but whenever a payment had become due to the Plaintiff, they had discovered that this "understanding" was not shared, or at least acted on by him. It is not therefore to be wondered at, nor was it unreasonable that they should at once require, as the condition of receiving future payments from the Plaintiff in Dollars, that the footing on which these were accepted should be embodied in a formal agreement.

Now, if the modification on the Contract upon which the Plaintiff bases these proceedings had been, as he now pretends, mutually agreed to between the parties—there would have been no reluctance on his part to execute the required agreement. It appears however from the documentary evidence produced, that from April 1877, when the Draft agreement was transmitted to him by the Defendants, until December in the same year, the Plaintiff, although repeatedly applied to, declined to execute the agreement. This hesitation and delay we cannot but regard as the strongest evidence that the mutual consent upon which he now founds as having modified the terms of the Policy, did not exist on his part, and that while the Defendants were prepared to accede to it, he was anxious, if possible to obtain every advantage which could have accrued to him in virtue of such an arrangement, vizt: to continue paying his premium in Rupees, without, by executing the agreement, barring himself or his representatives from asserting a claim to payment in Sterling of any sums accruing to him or to them. Subsequently to

the institution of these proceedings indeed, it would appear that, in or about June 1878, he wrote to the Defendants' Agent here expressing his willingness to sign the Defendants' agreement, but only on two conditions: one of them which was merely the expression of what was clearly implied by the terms of the agreement was acceded to by the Defendants, and the other, payment to him of the difference between the Sterling value of the surrendered *Bonus* and its value in Rupees at two shillings already received by him. As we have indicated, we think this sum could only legally be claimed by the Plaintiff on the footing that all sums due under the Policy are payable in Sterling, and his offer to sign the agreement under a condition which the Defendants are not prepared and were not bound to accept, does not in our opinion affect the conclusion to be drawn from his conduct—namely that while founding upon the mode in which payments under this Policy have been made to and accepted by the Defendants, as rendering premiums payable in Rupees at two shillings, he repudiates and refuses to admit any corresponding modification with reference to payments which have become or may become due by the Defendants under the Policy. If this be, as we think it is, the legitimate inference to be drawn from the Plaintiff's conduct, it follows that the mutual consent, which alone can modify the express terms of the Policy, is wanting, and we must construe this Contract in conformity with the stipulations in the Deed. As we have already seen, the expressions used in the Policy admit under the Law of England, where it was made, of only one construction, namely that payments whether by the Plaintiff or by the Defendants are exigible in Stirling, or in such a sum in the Currency of the place where made as is equivalent to Sterling, in this instance, Rupees at the current rate of Exchange on London. The tender made and sums deposited in this case being admitedly insufficient in this view, we declare the same to be insufficient, refuse the Plaintiff's motion and dismiss his summons with expenses.

The summons raises another question, vizt, with regard to the right of the Plaintiff to claim the submission of this matter to arbitration — but this point was expressly abandoned by the parties, and the decision of the suit placed upon the point just disposed of.

The same course will be followed with regard to the other two summonses subsequently taken out by the Plaintiff.

SUPREME COURT

—

APPEAL FROM JUDGMENT OF COMMISSIONER IN BANKRUPTCY. COMPETENCY OF BANKRUPTCY COURT IN THE CASE OF A TRADER WHO HAS CEASED TRADING FOR SEVERAL YEARS.

Held that it is not the act of Bankruptcy committed by a person which renders such person amenable to the Bankrupt law, but his capacity of trader;

That a trader who has retired from business for several years may become bankrupt in respect of debts contracted during the period of his trading;

The Court therefore dismissed this appeal with costs.

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E. GALLET,—Of Counsel for Appellant
T. NICOLAS,—Attorney for the same

E. PELLEREAU,—Of Counsel for Respondent
J. MERCIER,—Attorney for the same

—

HÉBRARD,—Appellant

versus

RANDABEL,—Respondent

—

Before

His Honor N. G. BESTEL,—Acting Chief Judge

and

His Honor E. J. LECLÉZIO,—Acting Second Puisne Judge

—

18*th July* 1879.

This is an appeal from an order of the Honorable Commissioner in the Court of Bankruptcy whereby he overruled an objection raised by the appellant as to the incompetency of the Court of Bankruptcy. It appears that the appellant, while he was licensed as retailer of wine and beer in the year 1875, subscribed a Bon or obligatory

writing in favor of the Respondent in the sum of $ 470.25 payable in 28 equal monthly instalments of $ 16.70 each, and it is declared in an affidavit of Respondent that a balance of $ 370.05 is still due to him on the said Bon. The appellant was called by a summons issued under the provisions of article 29 of Ordinance 33 of 1853 to appear before the Bankruptcy Court to admit or deny the said claim preferred against him. He appeared and declared that he had ceased to be a trader for the last three years and that as a consequence he was no longer amenable to the Court of Bankruptcy; the Judge Commissioner overruled the exception and it is against this decision that an appeal has been lodged. In the petition of appeal two grounds are stated, the first is that the Court of Bankruptcy is incompetent in the matter, because the appellant is no longer a trader, and the second because the claim preferred is not due. This second ground has not been argued before us, so we have now to deal with the first ground only.

Two decisions were quoted to us by the appellant's counsel in favor of his theory, both of them given by His Honor Sir Charles Farquhar Shand sitting in the Insolvency Court, the first in 1861 and the second in 1865, by which he held that a party who had ceased to be a trader for a certain number of years and having entered into other business, of a civil nature, could not be refused the benefit of a Cessio Bonorum. The words used by the learned Judge in the first case (Billing) are the following:

"The Court could not adopt the argument "of the opposing creditors that the party "who has once contracted a commercial "debt, is for ever, and during all the vicissi- "tudes it may be of the longest human life, "to be dealt with as a trader in relation to "that debt, to the *absolute exclusion*, of the "remedies that may be opened to him as an "insolvent."

In the second case (Pougnet) the application was also for a Cessio Bonorum which, if granted, was to protect the petitioner's person from incarceration, and the learned Judge stated that he did not find sufficient grounds in the objection taken "for refusing the personal protection from arrest which is all that the insolvent asks of the Court: and he quoted the decision in the case of Billing in support of his ruling.

It may be remarked here that when these two decisions were given, caption and imprisonment for debts of a commercial nature as a means of coercion for the payment thereof, were still permitted by our Laws, and the applications of Billing & Pougnet for a Cessio Bonorum before the insolvency Court, was merely for the sake of avoiding incarceration.

The opposing creditors simply objected to their right of obtaining relief before the insolvency Court, and did not move before the Court of Bankruptcy that they be adjudicated bankrupts. "Being in abject poverty, "says the Judge in Billing's case, he could "not show a prospect of a dividend to his "creditors, and without that, no debtor could "himself proceed under the Bankruptcy act, "as the concurrence of a creditor was neces- "sary, and such concurrence the present "applicant had no hope of procuring."

In Pougnet's case, we read the following passage: "His incarceration would probably put an end to the attempt of his wife to retrieve the position of his family, and realize some means for the benefit of all parties; besides the insolvent has offered to pay a monthly sum not unreasonable, looking at the amount of his salary for the benefit of his creditors."

It is very probable that the learned Judge was influenced by the special circumstances of these cases; the only attempt of the opposing creditors being to preserve their right of incarcerating their debtor as a means of coercion to obtain payment, no application having regularly been made to the Court of Bankruptcy as in the present case to have the debtors adjudicated bankrupts, their impossibility of themselves applying for that remedy having no dividend to offer to their creditors, as required by the Bankruptcy Law; these are facts which must certainly have had great weight, and induced the learned Judge to maintain the jurisdiction of the insolvency Court in which he sat, and entertain the petitions for relief made to him. It is true that amongst the motives given by him in the case of Billing, he appears to have expressed the opinion that a debtor who has left off trading altogether, is no longer amenable to the operation of the Law of Bankruptcy, but he adds so as to exclude him from the benefit of a "Cession de biens," and we have just seen that in that case no body moved that Billing be adjudicated a bankrupt, and that he himself could not apply to the Bankruptcy Court, having no dividend to offer, and he would have therefore been left without a remedy, if his petition had been set aside.

We therefore cannot look upon the decisions in the cases of *Billing & Pougnet* as

precedents applicable to the present one ; and when we examine the English jurisprudence in matters of this kind, we find that parties who have ceased to be traders, may still be brought before the Court of Bankruptcy in respect of debts contracted while they were in business. In the case of *Baillie* v. *Grant (in the House of Lords)* 9 *Bingham p.* 121, *Tindal C. J.* said : " It has been established " beyond dispute, that a petitioning creditor"s " debt, contracted during the trading of the " debtor, will support a commission taken " out against him on an act of bankruptcy " committed after the trading has ceased. " This point has been settled to be the Law by " various decisions commencing with that of " *Hyler v. Hall* (Palmer's Report 325 and " ending with that *exparte Bamfood* 15 Ve- " sey's Reports 449.)"

In this last case the argument of the counsel for the assignees was the following : "The " objection that the petitioner has retired " from business, if it should prevail, would " supply a new and easy mode of evading the " Bankrupt Laws. Can a trader, meaning to " commit an act of Bankruptcy prevent all " the consequences attaching upon his pro- " perty, by shutting up his warehouse ? such " a notion is contrary to all experience, and " the whole spirit of the Bankrupt Law, " according to which if a man has contracted " debts in the course of trade, he cannot by " ceasing to trade, withdraw from the conse- " quences." And the Lord Chancellor in giving his judgment said : " Upon the point " which has been taken at the trial whether " a commission can be sustained by an act " of Bankruptcy, committed after retiring " from trade, the debts contracted in the " course of that trade remaining unpaid, I " shall say no more than that my clear opi- " nion unqualified by any doubt is that the " commission may be sustained, and I should " not have heard so much upon it, if I had " not understood that two of the Judges held " different opinions upon that question at " the assizes."

In presence of such clear authorities, there can be no doubt that a man who has retired from business may become bankrupt in respect of debts contracted during the period of his trading ; it is impossible, as suggested in the course of the argument, that exceptional circumstances may induce the Court of Bankruptcy to declare itself incompetent in certain cases brought before it, the case of *Billing* who had ceased trading for 13 years when his petition for a Cessio Bonorum was opposed by one of his creditors, might perhaps have been considered one of such exceptional cases by the Bankruptcy Court if his adjudication had been moved for, but as a rule we think that the principle laid down by the English decisions above quoted is a sound one and ought to be followed here.

It has been argued for the appellant that he had as yet committed no act of Bankruptcy and that in all the English cases referred to, the parties who had ceased trading, had been declared amenable to the Bankruptcy Laws because they had committed an act of Bankruptcy after they had retired from business. We do not consider the distinction sought to be established as a sound one. It is the fact that a person is a trader that renders him liable to become a bankrupt. The Ordinance uses the words " such trader " which means a trader subject to the Bankrupt Laws. (See *Fonblanque* 282.) If a person was a non-trader, any act of his could not be called an act of Bankruptcy, and subject him to the Bankruptcy Laws.

It would certainly be impossible to call a trader before the Court of Bankruptcy in virtue of Articles 29 and following of Ordinance 33 of 1853, if a previous act of bankruptcy was necessary to render the Bankruptcy Court competent. These sections have provided for a more speedy mode of procedure, which did not exist in the Statutes under which the decisions above quoted were given. But this is no reason why we should not apply them to our Law such as it is now. It is clear that the party summoned in virtue of Art. 29, if considered as still subject to the Bankruptcy Laws, altho' he has ceased trading for some time, must either deny or admit the debt ; if he admits it, and he does not pay within the delay fixed, he shall be deemed to have committed an act of Bankruptcy. It is true this act of Bankruptcy would be posterior to his appearance before the Judge Commissioner, but it is only a consequence of the procedure traced out to obtain such appearance before the Court of Bankruptcy and this is an additional proof that it is not the act of Bankruptcy committed by a person that renders him amenable to the Bankrupt Law, but his capacity of trader, and that capacity has been held to continue in the person of the trader who has retired from business, in respect of debts contracted while he was trading in order that he should not evade the consequences of the Bankrupt Laws simply by ceasing his trade and entering into civil business.

We must for the reasons above stated dismiss this appeal with costs.

not deemed it necessary to express. This is more especially true with regard to Commercial Contracts. The principles upon which, in interpreting such conventions, weight is allowed to usages or Custom of Trade are very clearly laid down, in a recent case, somewhat analogous to that before us, by Mr. Justice Coleridge. "Mercantile Contracts" (observes that learned judge) "are very commonly "framed in a language peculiar to merchants: "the intention of the parties, though perfectly "well known to themselves, would often be "defeated if this language were strictly cons-"trued according to its ordinary import in "the world at large; evidence therefore of "mercantile custom and usage is admitted, "in order to expound it and arrive at its true "meaning. Again, in all contracts, as to the "subject matter of which known usages pre-"vail, parties are found to proceed with the "tacit assumption of these usages; they com-"monly reduce to writing the special parti-"culars of their agreement, but omit to spe-"cify those known usages, which are inclu-"ded however, as of course, by mutual un-"derstanding: Evidence, therefore, of such "incidents is receivable. The Contract, in "truth, is partly express and in writing, "partly implied or understood and unwritten" (*Brown* v. *Byrne*, 3 Ellis and Blackburn p. 703). From the very principle upon which usage or custom is recognized as the expositor of a contract it follows that when invoked to explain any particular Contract the party invoking it must show that the usage was known to and contemplated by the parties. This, it was contended by the Plaintiffs, might be done in one of two ways: either by proving knowledge on the part of the contracting party against whom it is sought to invoke it, or by establishing that the alleged usage is so general, so uniform, and of such long continuance as to warrant the presumption that the parties contracted with reference to it.

In the present instance they allege that in one or other of these ways they have established, as against the Defendant here a Custom of Trade between French Ports and Mauritius entitling them to tender and obliging him to receive, in satisfaction of the Freight due under these Bills of Lading Rupees at the fixed rate of Frcs. 2.50.

We shall accordingly now proceed to consider whether the Plaintiffs have succeeded in establishing that these Bills of Lading must be read as impliedly qualified by the alleged usage, either by showing knowledge by the Defendant of the usage, or by showing that the usage is of such a character that the Defendant must be presumed to have contemplated it, and cannot be heard to allege or prove his ignorance of it.

First of all: Have the Plaintiffs shewn that the Defendant, when he granted these Bills of Lading, knew of the existence and contemplated the effect of the alleged usage, by which the freight stipulated in Francs would be payable in Rupees at the fixed rate of one Rupee for Frcs. 2.50? It was not seriously contended by the Plaintiffs that they had been able by direct evidence to establish notice of the existence of the usage, on the part of the Defendant. On the other hand the Defendant was examined and deponed that he had never before been in Mauritius; that the Charter Party and Bills of Lading were drawn out by himself without the intervention of a Broker; that when entering into these contracts he was not aware that the Rupee was current in Mauritius; and that he had absolutely no knowledge of the existence of any usage relating to the payment of freight in Rupees at the fixed rate of one Rupee for Frcs. 2.50, and never contemplated that the sums stipulated in francs, in the Charter Party and in the Bills of Lading, would be paid upon that footing. He also produced a letter from the owners of the ship from which it appeared that they also had no notice of these facts.

We are satisfied that the Plaintiffs have entirely failed to establish their case—in so far as it rests upon bringing home to the Defendant *knowledge* of the usage relied on. The Plaintiffs however relied chiefly upon the second alternative contention abovementioned, vizt: proof that the alleged usage was so general, so uniform and of such long continuance as to warrant the presumption that both parties contracted with reference to it, and to exclude either party from protecting himself by alleging or even proving his ignorance.

When we consider the nature of the usage which it is sought to set up here, it appears to us that there is the greatest room for doubt, whether this branch of the Plaintiffs' contention is tenable. The custom invoked is said to affect the payment of freight for the conveyance of goods from French Ports to Mauritius, and to give a meaning, peculiar to the Colony, to the term *Francs* when employed in Bills of Lading. No doubt, where it can be established that both parties to the contract knew and contemplated this special meaning, it is proper that their agreement should be construed in accordance with it. But can it be said that even the most uniform and long continued usage of any particular Port, (even if, as here, the only Port in a Colony), as to the settlement of freight expressed in Francs, can raise an irrebutable presumption against the Master of a Vessel, who is totally unacquainted with the Colony,

that in contracting to bring goods here, he knew and acted upon the local usage? It seems very doubtful whether, according to the principles of English Law, this can be succesfully maintained. In support of their view, the Plaintiffs referred, among others, to the cases of *Noble* v. *Kennaway* (II Douglas page 510); *Rogers* v. *Mechanics Insurance Company* (I Story page 603) and cited Parsons on Marine Assurance (Vol. I p. 89). But, in the case of *Kirchner* v. *Venus* (12 Moore P. C. page 361) it was laid down by the Judges of the Privy Council that "when "evidence of the usage of a *particular place* "is admitted to add to or in any manner to "affect the construction of a written contract "it is admitted only on the ground that the "parties who made the contract are both "cognizant of the usage, and must be pre-"sumed to have made their agreement with "reference to it. But no such presumption "can arise when one of the parties is ignorant "of it. In this case (said Lord Kingsdown "who delivered the judgment) "the endor-"sees of the Bill of Lading, were resident," "not in Liverpool, but in Sydney, and though "they may be Agents for Merchants resident "in London, there is no evidence that these "gentlemen were acquainted with the alleged "usage of Liverpool."—See also the cases of *Bartlett* v. *Pentland* (10 Barn and Cress: 760) *Sweeting* v. *Pearce* (30 L. J. C. P. 109) and the case of *Winsor* v. *Dilloway* (4 Met. p. 223), where the inference from a general and uniform usage of long continuance was held to raise merely a presumption of *fact* and not of *Law*; an inference which might therefore be controverted by evidence.

If we turn for guidance to the principles of French jurisprudence, we find that there is not wanting authority in support of the same doctrine. Thus, it has been held in a Commercial case that the usage of a particular place is not binding on a stranger to the locality, when he has not had notice of the existence of the usage.—*Tarcher* v. *Perronnet Cassard* 26th January 1869. Devilleneuve et Carette 1869 II p. 195. See also the note of the Arrétiste on the decision of the Court of Cassation in the case of *Saint* v. *Blampain* 26th May 1868. Devilleneuve et Carette 1869 I p. 33.

Assuming however that such a usage as that invoked here may be relied on to construe the Contract of parties, one of whom was ignorant of its very existence, it cannot be disputed that, in order that the usage founded on should have this effect, it must be long established, certain, well known and uniform. What evidence will satisfy these requirements and render the usage binding in any particular case, must of course, be determined by the special character of the usage, and the peculiar circumstances of each case.

Evidence has been adduced here at very great length which appears to us to establish beyond a doubt that a practice exists in this Colony by which freight due on Bills of Lading for goods shipped at French Ports for Mauritius, expressed in Francs, has, as matter of fact, been paid and received in Rupees on the footing of one Rupee being equivalent to Frcs. 2.50. — The only instance in which an apparently different rule has been adopted, is in the case of Freights due to the Messageries Maritimes Company for goods imported by their Steamers. From the evidence of the Mauritius Agents of this Company (Messrs. Blyth Brothers) there can be no doubt that the freight on such goods has invariably been demanded and paid in Rupees at the Current rate of Exchange. But, though an apparent exception to the prevailing practice, this does not appear to be inconsistent with it, as it is in evidence that, in the case of this Company, freight is payable, according to their tariff, *before* goods are shipped, and, when by favour, payment is not exacted in France, it is nevertheless recovered here on the footing of having been due there. Apart from this case, there can be no doubt that the general practice among merchants here, has been to pay and receive Rupees at the rate mentioned in satisfaction of freight expressed in Francs. Assuming the existence of this practice, the next point to which we must direct our attention is the length of time during which the practice has prevailed.

The question how long this practice has existed, is greatly complicated by the recent changes which have taken place in our Currency.

We cannot doubt that when it is sought to set up a Custom rendering freight expressed in Francs payable in Rupees at a fixed rate, any legal enactment affecting the value of the Rupee must be of vital importance. A practice prevailing, it may be for a long period, when the Rupee had legally one value assigned to it may be inept to establish a usage sought to be founded on when the Rupee no longer retains the same legal tender value. Suppose, for example, that the Rupee had been for years the legal equivalent of Frcs. 2.40 and, during that period, had invariably been given and received in payment of freight at the rate of Frcs. 2.50. It could not, we think, be maintained that this usage, however well established and widely known, could be invoked as rendering freight expressed in Francs, and due under a Bill of Lading granted after

the Rupee had ceased to have that legal value, payable in Rupees at the former rate. To such a pretention it might be conclusively answered that the previous usage could no longer be invoked as raising a presumption that the Creditor contemplated receiving Rupees in payment of Francs at the old rate after the legal value of the Rupee had changed.

But the order in Council of 12th August 1876 has practically operated such a change in the value of the Rupee. Prior to the promulgation of that Order, the Rupee, in virtue of Ordinance No. 30 of 1875, had a legal value assigned to it as the equivalent of two shillings sterling. At the same time the five franc piece (under the Order in Council of February 1843, which in this respect had not been affected by the Ordinance of 1875) possessed a similar value as the equivalent of three shillings and ten pence half penny sterling.— But the Order in Council of 1876 deprived the Rupee, *quoad* all future contracts, of its value as the legal equivalent in Mauritius of two shillings sterling, and left it merely its intrinsic value. In these circumstances, we think that the practice which undoubtedly prevailed under the Ordinance of 1875, in virtue of which the Rupee was received and paid at the rate of Frcs. 2.50 in satisfaction of freights expressed in Francs, cannot be invoked in support of the contention, that freight expressed in francs and due under Bills of Lading, dated subsequently to the promulgation of the Order in Council of 1876 is payable in Rupees at the former rate. To such a contention, the conclusive reply is, assuming that when two Rupees were the legal equivalent of four shillings sterling, and five Francs the legal equivalent of three shillings and ten pence half penny sterling, the Defendant consented, or, in virtue of the existing usage must be taken to have consented, to receive the Rupee in satisfaction of a debt of Frcs. 2.50, that consent or that usage cannot be presumed to have been impliedly imported into a contract made after the Rupee had ceased to be the legal equivalent of two shillings, to the effect of compelling him still to receive it in payment of Frcs. 2.50. We are accordingly of opinion that, by depriving the Rupee of its value as the equivalent of two shillings, the Royal Order in Council of 1876, has rendered the previous practice inept to establish a usage fixing the rate at which it may be tendered in payment of freights expressed in Francs, and due under Bills of Lading dated subsequent to 1st January 1877.

We therefore consider, that, in establishing the usage founded on by them, the Plaintiffs here cannot rely on evidence of the practice which prevailed under the Ordinance of 1875, but are limited to that which has existed since 1st January 1877 when the Order in Council of 1876 was promulgated. But taking the usage relied on here as dating only from the beginning of 1877, we are clear that, however uniform it may have been, it cannot be regarded as raising a presumption that when, in August 1878, the Defendant granted the Bills of Lading held by the plaintiffs, he must be taken to have known and contemplated that usage as qualifying the manner in which the Freight due under them should be paid, and be deemed to be excluded from pleading and proving his ignorance of such usage. The shortest practice which has been cited to us as having been sustained as constituting a usage of trade, is three years. *Nobbs* v. *Kennoway* (11 Douglas. 510), and that is stated to have referred to "a certain very limited branch of trade."— In this instance, looking to all the circumstances of the case, and to the nature of the usage sought to be set up, we could not have recognized it, even had it rested on a longer course of practice, and we have no hesitation in rejecting it here, when it can only be carried back by competent evidence for one year and eight months before the execution of the contract which it is invoked by presumption to qualify.

On this branch of their case also, we must accordingly hold that the Plaintiffs have failed to support their contention, and to establish such a custom as will qualify the stipulation as to payment contained in these Bills of Lading.

There only remains to be considered, the question of the rate at which the Rupee is to be estimated in payment of the freight stipulated by these Bills of Lading in Francs. The Plaintiffs contended that no proportional value being assigned by our Law to the Rupee, we must adopt as the measure of its value in satisfying a debt due in the Colony in Francs, the relative intrinsic value of the Rupee to the Franc. Both of these coins respectively contain a fix quantity of silver of a certain fineness, and it was urged that, as this debt is dischargeable in the legal Currency of Mauritius, the place of payment, what was due to the Defendant was such a number of Rupees as would furnish to him silver to an amount and of a fineness equivalent to silver of the amount and fineness contained in the number of Francs stipulated as freight. The Defendant on the other hand maintained that while he could not refuse to accept payment in Rupees, he was entitled to exact such a number of Rupees as would enable him to buy Francs, or a Bill of Exchange on France for the number of Francs

due to him; in other words that he was entitled to Rupees at the Current Rate of Exchange. Neither of these contentions are free from objection Against the Plaintiffs' contention it may be urged that by their system the creditor would receive less than the equivalent of what he stipulated for, as, while he would obtain silver to the amount due, he would receive it in a form other than that stipulated, and would therefore be underpaid to the amount necessary to convert what he got from the form of Rupees into that of Francs. On the other hand, against the Defendant's theory, it was urged that the debtors would thereby be condemned to pay more than was due, as they were only liable to pay Francs in Mauritius; whereas, by paying in Rupees at the Rate of Exchange on France, they would be made to give the equivalent of Francs in Paris, and would lose (and the creditor gain) the sum necessary to remit Francs from Mauritius to Paris.

The question appears to us to be one of great importance and delicacy, and, as we think the matter is not yet ripe for decision, we shall, before pronouncing any final decision with regard to it, allow the parties an opportunity of laying before us the evidence of such skilled witnesses, as they may think proper to call, and of submitting to us such further argument on the point as they may deem fit. For the meantime all questions of costs will be reserved.

SUPREME COURT

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DEMAND IN NULLITY OF A FIAT SENDING THE CURATOR OF VACANT ESTATES IN CHARGE OF AN ESTATE, AND IN NULLITY OF A JUDGMENT OF ADJUDICATION — PRELIMINARY OBJECTION AS TO THE RIGHT AND CAPACITY OF PLAINTIFF TO MAKE SUCH A DEMAND.— IRREGULAR SUCCESSION.—ART. 766 OF CIVIL CODE.—ORDER IN COUNCIL OF 24 SEPTEMBER 1814.— CODE FARQUHAR No. 174.

Held that the rights of inheritance established by art. 766 of the Civil Code in favor of natural relations were based upon a relationship acknowledged by the parents, or at least by one of them; and that when the parents were uncertain or unknown the supposed relationship being itself a very uncertain one could give no right in virtue of the said article;

That in this case, the declaration made by the master of Eléonore and Virginie Lapaille, although stating their existence, their age and their names, did not establish their relationship as required by Order in Council of 24th September 1814, and was not therefore by itself sufficient to establish the certainty of relationship required by the Code to give rights of inheritance to persons described therein;

That consequently the parents of Eléonore and Virginie Lapaille being unknown, the children of Virginie Lapaille could not invoke Art. 766 of the Civil Code in order to claim rights as representing their mother in the succession of Eleonore Lapaille. Action dismissed.

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LAPAILLE,—Plaintiff

versus

FERRAN & ORS.,—Defendants

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Before

His Honor N. G. BESTEL,— Acting Chief Judge

and

His Honor E. J. LECLÉZIO,—Acting First Puisne Judge

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H. GALÉA,—Of Counsel for Plaintiff
W. LEBLANC,—Attorney for the same

E. GALLET,— } Of Counsel for Defen-
H. HEWETSON,— } dants
W. HEWETSON,—Attorney for the same

Record No 19777.

25th July 1879.

The plaintiff in this case styles himself the natural nephew of one Eleonore Lapaille who died on the 7th June 1854 in the district of Moka and asks that the proceedings in virtue of which the sale by forcible ejectment of a plot of ground of four acres depending from the succession of the said Eleonore Lapaille was made before the Master of this Court on the 2nd August 1859 at the request of Miss Chelin a creditor of the said Eleonore Lapaille be declared null by the Court because the said sale was made upon the Curator of Vacant Estates who was wrongly sent into possession of the succession of

Eleonore Lapaille upon an affidavit stating it was vacant, whereas it was represented, as alleged, by plaintiff and his brothers and sister, the natural nephews and niece of Eleonore Lapaille.

A preliminary objection was taken by the defendants to the effect that there was no evidence produced to the Court shewing that the plaintiff and his brothers and sisters are the natural nephews and niece of the deceased Eleonore Lapaille entitled as such in virtue of Art. 766 of the Civil Code to her succession. The acts of Civil Status tendered by them show that they are the children of one Virginie Lapaille who died a few days before Eleonore Lapaille and there is also an Extract from the Register of the late Slave Population in this Island year 1826 according to which Mr Charles Périchon of the district of Plaines Wilhems declared that in 1826 Eleonore Lapaile was sixteen years old, a creole of Mauritius, and sister of Virginie Lapaille, and that Virginie Lapaille was ten years old, a creole of Mauritius, and sister of Eleonore Lapaille; the names of the father and mother of those persons are not given in Mr Périchon's declaration, and when Eleonore and Virginie died in 1854 the persons who declared their death to the officer of the Civil Status of Moka stated that their father and mother were unknown. It was contended for the defendants that the rights of inheritance established by Art. 766 of the Civil Code in favor of natural relations are based upon a relationship acknowledged by the parents or at least by one of them, and that when the parents are uncertain or unknown the supposed relationship being itself a very uncertain one can give no right in virtue of the said article; the opinion of Chabot, Zachariæ and Demolombe were quoted, and indeed it does not appear that under the Civil Code a different opinion could be entertained. But it was argued on behalf of the plaintiff that the Royal Order in Council of 24th September 1814 in pursuance of which the declaration of Mr Périchon was made in 1826 should be construed so as to allow parties who are described in such declarations as relatives to enjoy the right of inheritance which the Civil Code attributes to such relations; Art. 19 of Ord. 17 of 1871 was quoted according to which "all extracts duly certified by the Registrar General from the "General Slave Register made in pursuance "of the Royal Order in Council of 24th September 1814, and containing the name and "description of any person borne upon the "said Register, shall have, to all intents and "purposes, the same validity and effect "as any extract from the Registers of the "Civil Status."

We shall, as the law requires, look upon the extract now before us as an extract from the Registers of the Civil Status, and examine it as such. Can we consider it as giving to the two parties therein named a capacity which would have entitled the one to succeed to the estate of the other in virtue of Article 766 of the Civil Code?

There is no doubt that if we look at this extract by the light of the principles of the Civil Code on matters of succession, it is insufficient to establish the certainty of relationship required by the Code to give rights of inheritance to the persons described therein. But we were asked on account of the position in which slaves stood at that time to extend such rights to these persons notwithstanding the omission of the names of their mother and father?

We read in the Royal Order in Council of 24th September 1814 which was promulgated in the French language in April 1815 the following passages relative to the first registration of slaves to be made in this Island "le recensement contiendra une liste "de tous les esclaves qui auront des maris et "des femmes, soit par un mariage réel, soit "par une cohabitation connue et constante, ou "qui auront des pères et des mères ou des "frères ou des sœurs parmi les esclaves de la "dite habitation. Chaque section sera intitulée "la famille de A. B. y mettant en tête le "nom du chef de famille, ou quand il n'y "aura que des frères ou autres parents au "même degré le nom de l'individu le plus "âgé. Dans la neuvième et dernière case "ayant en tête de sa colonne le mot *parenté* "qui sera ajouté comme il a été dit ci-dessus "devra être mis le degré de parenté qui "existe entre l'esclave et le chef de famille, "dont la section de la liste des familles à "laquelle appartiendra le dit esclave, portera "le nom comme il a été dit ci-dessus, avec "tels autres détails de généalogie et de parenté, que le propriétaire ou celui qui fournit le recensement jugera nécessaire d'y "ajouter."

It was also enacted by the said order in Council that at the beginning of every year every owner of slaves was to deliver to the Registrar of slaves "un compte ou état par "écrit par elle souscrit (qui sera appelé recensement annuel des esclaves) contenant "un rapport fidèle et détaillé de toutes les "morts et naissances des esclaves attachés "ou appartenant à l'habitation..... et "aussi un rapport de toutes les diminutions "ou augmentations qui auront eu lieu sur la "quantité précédente des esclaves apparte-"nant à la dite habitation, par tout autre

" moyen que celui des naissances ou morts " ..... chacun des dits recensements an- " nuels contiendra en outre, relativement à " chacun des dits esclaves nouvellement ac- " quis qui y sera dénommé, tous les détails " qui ont été ordonnés par le présent d'être " mentionnés dans les dits recensements ori- " ginaires."

We presume that the declaration contained in the extract from the Register of the late slave population, year 1826, mentioning Eleonore and Virginie Lapaille as two sisters, was made in pursuance of the provisions above quoted, and we are disposed to consider it as an ordinary extract from the Registers of the Civil Status, but we see nothing in the order in Council of 1814 which authorises us to give to it more weight than to an act of the Civil Status. Now if for instance in a declaration of birth before the officer of the Civil Status B. were stated by the person making the declaration of birth to be the sister of B. without giving the names either of the father or of the mother of A. and B. that would not be sufficient to establish the relationship of A. and B. so as to give to them rights of inheritance in virtue of Art. 766 of the Civil Code ; their parents being unknown there could be no certainty as to the relationship between them. Eleonore and Virginie Lapaille stand exactly in the same position. The declaration made by their master is not one of birth, but although stating their existence, their age, and their names it does not establish their relationship as the Civil Code required it, and even as the Order in Council itself contemplated it as may be seen by the quotations herein above made. So it cannot be said that their character of slaves at the time of the declaration produced by the plaintiff was the cause of its insufficiency for the law then in force concerning slaves (the order in Council of 1814) required just as the Code Civil that the names of the parents be given by the person making the declaration ; and if the names of the parents of Eleonore and Virginie Lapaille were not given we must infer that it was because they were unknown. Chabot under Art 766 says : " l'article 766 " ainsi que l'article 765, ne peut s'appliquer " qu'à des enfants naturels qui ont été légale- " ment reconnus ou en faveur desquels la " paternité ou la maternité a été établie con- " formément aux articles 340 et 341. Les " enfants naturels dont le père et la mère sont " inconnus, ou incertains aux yeux de la loi, " ne peuvent se dire les parents d'aucune " personne et conséquemment ne peuvent " succéder à personne. La parenté ou le lien " du sang ne peuvent résulter que du chef " du père ou de la mère dont on est issu, il " est évident qu'il faut d'abord prouver qu'on " est issu de tel père ou de telle mère, pour " que l'on puisse se dire lié par le sang à la " famille de l'un ou à la famille de l'autre, et " venir dans l'une ou dans l'autre prendre les " droits d'un parent naturel ? "

These principles appear to us applicable as well to the late slave population as to the free population, for we find nothing in the Order in Council which could justify our disregarding them. We think that the declaration concerning Eleonore and Virginie is not by itself sufficient in law to establish between them such a relationship as entitling the one to succeed to the estate of the other.

Their position being that of persons whose parents are unknown, the children of Virginie Lapaille cannot invoke Art. 766 C. C. in order to claim rights as representing their mother in the succession of Eleonore Lapaille and the present action introduced by them must therefore be dismissed unless they choose to elect for a non suit.

BAIL COURT

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APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE.—CHARGE OF LARCENY.

Held that the fact of a person, in his own house, asking the holder of a bill subscribed by him and who had gone there at the request of such person to get payment of the bill, to receipt such bill, and getting possession of it by offering to dry the freshly written receipt by throwing sand over the bill, and refusing to give it back, constituted larceny. Appeal dismissed with costs.

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PAINTER,—Appellant

versus

THE QUEEN,—Respondent

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Before

His Honor N. G. BESTEL,—Acting Chief Judge

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L. A. THIBAUD,—Of Counsel for Appellant
H. THATCHER,—Attorney for the same

E. M. Wood, Substitute Procureur General,
Of Counsel for Respondent
J. Bouchet,—Attorney for the same.

Record No. 458.

26th August 1879.

This is the third attempt made by one Gautier the bearer of a bill subscribed by the appellant along with others to obtain judgment against the appellant for having unduly taken possession of that bill duly receipted by Gautier and handed over to the defendant for the purpose of obtaining from him payment of the amount of the receipted bill. He first charged Painter with having swindled him out of the said bill. The 1st charge was dismissed by the Junior District Magistrate and no appeal was made by Gautier of that judgment. The 2nd charge preferred by Gautier was one of embezzlement. On this charge Painter was convicted but on his appeal to the Supreme Court the conviction was quashed by the then presiding Judge with the concurrence of his two brother Judges for the reasons in the said judgment set forth. Gautier however still bent on not being the dupe of Painter has brought this 3rd charge which is one of larceny. Painter once more convicted has lodged this appeal and the question now submitted to the appellate jurisdiction is whether the facts laid to the facts charged against the appellant constitute in law the offence of larceny. The facts are that Gautier having repaired by appointment to Painter's house for payment of the residue of the bill due by Painter was asked by this latter to receipt the bill, which Gautier did. On appellant's offer to dry the freshly written receipt by throwing some sand over the acquittance, Gautier handed over the bill to appellant expecting of course immediate payment from the promise made by appellant that on Gautier coming over to his house the appellant would pay the balance due upon the bill. After throwing sand over the freshly written receipt appellant went into the adjoining room. Gautier thought he had gone into that room for the money, but he returned empty handed that is without the acquitted bill, and without money saying "I am satisfied, I hold your acquittance; you may go."

Assuming the facts alleged to have been fully proved said *Thibaud*, those facts have none of the characters required by law to constitute the crime of larceny. "Il n'y a de "vol, (says *Blanche, Etude du Code Pénal "Vol.* 5 *p.* 560 *sur l'article* 379 *Code Pénal "Français*) que s'il y a *soustraction*, 2o. que "si la soustraction est frauduleuse, 3o. et a "pour objet une chose qui *n'appartient* pas à "celui qui la commet ou plutôt qui *appar-"tient à autrui.*" The same definition on larceny is copied verbatim in Art. 301 of our Colonial Penal Code. The French authorities may therefore be safely consulted in the decision of the case now before us.

"Le premier élément consiste donc, says "Blanche, dans une soustraction. Il est cons-"titué, lorsque la chose passe de la possession "du légitime détenteur dans celui de l'auteur "du délit à l'*insu* et *contre* le *gré* du premier, "Pour soustraire une chose comme la loi "l'entend il faut la *prendre*, l'*enlever*, la "*ravir* à son légitime *possesseur*. Lorsque la "chose a été *remise sans nécessité* par celui "ou même par un tiers à celui qui se l'ap-"proprie, elle n'est pas *appréhendée*, elle n'est "pas soustraite, elle ne devient pas l'objet "d'un vol, à moins qu'une disposition spé-"ciale comme celle du No 4 de l'art. 386 "C. P. F. ne lui attribue cette qualification."

Was there any *necessity* for Gautier to hand the receipted bill to appellant. It was not only necessary but *compulsory* that an opportunity be given to the debtor to examine the regularity of the receipt affixed to the bill before payment of the sum claimed by the creditor. The bill was not handed over with the intention of parting with the lawful possession thereof, but for the debtor satisfying his mind as to the correctness of the amount of the receipt, on the understanding of an immediate return in case of non payment. It was never handed over for any other purpose.

Had there been no *necessity*, no compulsion to hand over the bill to the debtor, and had Gautier nevertheless handed over the bill to the debtor, then there would be no *soustraction* in the legal sense of art. 379 of the French Penal Code, no more than in the legal sense of art. 301 of our Penal Code. I shall not stay to quote the authorities collected in Blanche in support of the distinction established by him vide page 360 to page 377 especially to page 384; vide also Sir Vil 2o. serie 1864 1 p. 242 Sir 2o. serie 1846 1 p. 328.

I have referred to the work of Blanche as the latest comment on criminal law and containing a review of the whole jurisprudence on this head of the criminal law. So much for the abstraction. The fraud required as the second condition in larceny is apparent. 1o. Appellant asked Gautier to his house to be paid 2o. The pretext of throwing some sand on the fresh writing was to get possession of the bill 3o. His going to the adjoining room as it were for money was for the purpose of lock-

ing up the non paid bill and prevent Gautier from taking it back; the taking by appellant was fraudulent and the 3rd ingredient is still more apparent as the bill was undoubtedly the property of another, that is of Gautier.

Upon the strength of art. 301 of the Colonial Penal Code explained as above this appeal is dismissed with costs, and I accordingly affirm the judgment of the Court below.

SUPREME COURT

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ACTION IN DAMAGES. — RIGHT OF WATER.

Held in this case, that the waters of the "Bambous" springs were not naturally tributary to and did not form part of the "Cocos stream," and that these springs were not conceded to the Plaintiffs by the Defendants under the judgment of 23rd February 1876.

That the Plaintiffs had failed to establish that the Reservoir springs at any time had any internal and visible flow into the "Cocos" stream, or that the artificial operations of the Defendants and their predecessors had decreased the quantity of water which had always found its way by subsoil percolation into the stream;

And lastly that, although the Defendants had cut some bambous trees near these springs, it could not be established that the diminution in the yield of the water of those springs had been caused by the destruction of these bambous by the Defendants; that therefore no damage had been shewn to have resulted to the Plaintiffs from the wrongful act of the Defendants.

The Court, therefore, on the whole case, gave judgment in favor of Defendants and found them entitled to costs.

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NAYL & LOUVET,—Plaintiffs

versus

MÉRANDON & Co.,—Defendants

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Before

His Honor N. G. BESTEL,— Acting Chief Judge

and

His Honor A. G. ELLIS,—Acting First Puisne Judge

—

P. L. CHANTELLIER,—Of Counsel for Plaintiffs
F. ROBERT,—Attorney for the same

G. GUIBERT,—Of Counsel for Defendants
J. GUIBERT,—Attorney for the same

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Record No 19976.

26*th August* 1879.

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Messrs Nayl and Louvet, the Plaintiffs in this case, are owners of the Sugar Estate "Albion," and Messrs Merandon & Co. are owners of the Estate "Gros Cailloux." These Estates are situated in the District of Black River and border upon the River Belle Eau. Within the last few years many questions with regard to their respective rights to the waters of this River have arisen between the proprietors of these Estates and engaged the attention of this Court. In 1874 it was decided (judgment of 11th February 1874, 14, Piston's Reports p. 17) in an action at the instance of the then owners of "Albion," that what was termed the "surplus" water of certain springs arising on "Gros Cailloux," which the owners of that Estate had for a very long period allowed to fall into the bed of the river Belle Eau, after turning the water wheels of their flour mills, had come to form part of the waters of the river Belle Eau, and that the owners of "Albion" as inferior Riverains, had by prescription acquired a right to a share of such "surplus" for the purposes of irrigation. Subsequently difficulties arose as to the meaning to be given to the term "*surplus*" as used in the judgment, and in a suit in which this question was raised an agreement was come to by the parties and embodied in and sanctioned by a judgment of the Court dated 23rd February 1876. By this judgment it was decided that the "surplus" of the "Gros Cailloux" springs, which had been held to form part of the river "Belle Eau," should be taken to be 70 cubic feet of water *per* minute during nine hours twice a week. With the view of putting an end to the disputes between the owners of "Albion" and "Gros Cailloux" Estates, with regard to their respective rights to the waters of the river "Belle Eau" the judgment further gave effect to the following agreement between the parties: On the one hand the owners of "Gros Cailloux" con-

sented to abandon all rights or pretentions which they might have to the waters, or any part of the waters, of Rivers "Cocos" and "Cabots" ("tributary streams of Belle Eau") and to the use and enjoyment thereof;" and to abstain from taking as borderers any share of the "surplus" waters of the "Gros Cailloux" springs, as above defined, or of certain springs which were known as Springs B and C.; on the other hand, certain rights were conceded to the owners of "Gros Cailloux" of which the only one of importance for our present purpose is that they (the owners of "Gros Cailloux") should "have a full, absolute and complete right to dispose of and use as they may think proper all the waters of all their springs either for irrigation or for any other purpose, but always under the exceptions just mentioned. In carrying out this judgment disputes again arose between the parties, but at length, after further litigation, another judgment was come to by consent of parties, and sanctioned by the Court on 8th December 1876. Under this judgment, extensive masonry works were constructed in the bed of the "Belle Eau" with the view of separating the shares of water actually belonging to the respective owners of "Gros Cailloux" and "Albion"; and in particular two pipes were inserted in such a way as to receive waters which were recognized as coming from the "Springs B" referred to in the judgment of 23rd February 1876, and to discharge them into the portion of the River bed assigned to the share of the water belonging to "Albion" Estate.

It might have been hoped that, after this long course of litigation, matters had at length been so arranged as to obviate further disputes between the proprietors of these Estates; but the result has shown the fallaciousness of such hopes, and we are again called on to adjudicate on differences which have arisen as to their respective water rights.

The present proceedings originated by an application at the instance of the owners of Albion for a writ of injunction against the owners of "Gros Cailloux", on the allegation that the latter had infringed the rights conceded to the former under the judgment by consent of 23rd February 1876. An injunction having been obtained, the owners of Albion raised this action to try the questions at issue between them and the Defendants as owners of "Gros Cailloux." In the declaration as amended, the Plaintiffs allege that the Defendants have violated the agreement embodied in the judgment of 23rd February 1876 in the three following particulars. The first concession in favor of the Plaintiffs contained in the said judgment is that "the "owners of Gros Cailloux (the Defendants) "waive and abandon all rights or pretentions "which they have to the use and enjoyment "of the waters of the Cocos." The Plaintiffs allege, (*primo*) that in breach of this provision, and in fraud of the rights thereby secured to them, the Defendants have caused two canals to be dug close to two springs (referred to hereafter as "the Bambous springs") which feed the Cocos, thereby diverting the waters of these springs from the said stream and converting them to their own use and enjoyment for the irrigation of the sugar plantations of Gros Cailloux. The Plaintiffs further allege (secundo) that in breach of the same povision, and in fraud of their rights thereunder, the Defendants, in order to divert the waters of other springs (hereinafter referred to as the Reservoir springs) which feed the "Cocos" have caused a Dam to be constructed and a large Reservoir to be built for the purpose of collecting the waters of the said springs, and of preventing them from following their natural course and flowing into the "Cocos." By a subsequent clause of judgment of 23rd February 1876, the Defendants undertook "not to take as borderers any share of the water "coming from the spring B." The Plaintiffs however allege (*tertio*) "that in breach of this "provision and in fraud of their rights, the "Defendants have wickedly caused a great "quantity of trees planted in the said spring "and alongside its course to the River "Belle Eau" to be cut and destroyed, the "consequence of which will be that in a "short time the said spring will become "dry."

On these allegations the Plaintiffs ask judgment finding that the Bambous and Reservoir springs are tributary to and feed the Cocos stream, and that the Defendants have no right to the use or enjoyment of the waters thereof, and ordering them to block up the Canals by which they at present divert the waters of the Bambous springs, and to destroy the dam and reservoir by which they prevent the waters of the Reservoir springs from flowing into the Cocos; and further, finding that the Defendants have no right to interfere with the Plaintiffs' enjoyment of the waters of "Spring B" by cutting or destroying trees and plants growing close to the said spring or along the course of its waters to the Belle Eau, and ordering the Plaintiffs forthwith to replant the same. The declaration concludes by praying that the Defendants be found liable to the Plaintiffs in damages to the amount of Rs 5,000.

In answer to this Declaration, the Defendants pleaded that they had not been guilty of any breach of the judgment referred to, and had not in any way injured the rights acquired by the Plaintiffs thereunder. With reference to the first and second counts of the Declaration they especially denied that the Bambous springs form part ot the "Cocos" or are tributaries thereof; and that the Reservoir springs are natural springs or form part of the said stream; and allege that the waters of these springs had long since been appropriated by the Defendants; that the present state of things existed at and before the judgment referred to, and that by the said judgment they are entitled to the full use and enjoyment of the said springs. Lastly, with regard to the third count, the Defendants denied that they had ever caused to be cut or destroyed any trees growing about the "Spring B" or along its course, within the distance prescribed by law, with the exception of a few Bamboo trees which they allege "do more harm than "good, in so far as the conservation of water is concerned."

In support of their respective allegations a great number of witnesses were called and examined at very great length by both parties. In the course of the case it became apparent to us that much light might be thrown upon several of the questions at issue by the personal inspection and examination of duly qualified surveyors. We accordingly, with the consent of parties, directed that two Sworn Land Surveyors (one to be nominated by each of the parties) should proceed to the spot and make certain practical experiments indicated by us, and should thereafter report the results obtained by them. The Report of these gentlemen, dated 13th June 1878, is now before us, and although the Reporters have not been able to concur on all points, the result of their labours, has, as we hoped, materially contributed to the elucidation of the questions submitted to us. A personal visit made by us to the localities referred to has also greatly facilitated our investigations.

From the foregoing narrative it will be seen that the plaintiffs' case is based on the allegation that the defendants have infringed their rights 1o by diverting the waters of the Bambous springs from their natural course as tributaries of the Cocos stream; 2o by preventing the waters of the Reservoir springs from following their natural course and flowing into the Cocos stream, and 3o by cutting and destroying plants and trees growing around the source of the spring B and along the course taken by its waters on their way to the Belle Eau. The rights said to have been violated by the Defendants, and now sought to be vindicated by the Plaintiffs, are founded on the judgment of 23rd February 1876 by which the Defendants, in consideration of corresponding concessions made by the Plaintiffs "waived and abon- "doned all rights or pretentions whatsoever "which they have to the waters or any parts "of the waters of the River Cocos × × × × "and to the use and enjoyment thereof" and further "not to take as borderers any "share of the waters coming from the springs "marked B × × × × ×" In these circumstances, as it was not denied that at the time when this action was instituted, the Defendants were in the use and enjoyment of the waters of the Bambous springs and of the Reservoir springs, the questions presenting themselves for our consideration are these: 1o whether the waters of the Bambous springs are tributary to and form part of the Cocos stream, and as such were ceded by the Defendants to the Plaintiffs under the terms of the judgment of 23rd February 1876; 2o whether the waters of the Reservoir springs are tributary to and form part of the said stream, and were in the same way made over to the Plaintiffs, and 3o whether the Plaintiffs have established any wrongful cutting and destruction of plants and trees prejudicially affecting the rights to the waters of spring B accruing to them under the said judgment.

We shall now proceed to consider and to determine these three points in their order.

First then: are the waters of the Bambous springs tributary to and part of the Cocos stream, and were they as such conceded to the Plaintiffs under the judgment of the 23rd February 1876 the Bambous springs take their rise in a piece of marshy land marked F F on a plan prepared by Mr. Reid, Government and Sworn Land Surveyor, dated 30th October 1878 and marked G. This marshy land is within some 200 feet of a long Cane Road leading from the mills and Establishment "Gros Cailloux" to the Batterie D'Argension Road. Standing at the springs and looking towards the Battery Road, the Cane Road is on the right hand, and at a considerable distance to the left; the Cocos Stream flows towards the Battery Road. The Cane Road and the bed of the Cocos Stream tend to converge, but are still at a considerable distance when they respectively reach the Battery Road. It was practically conceded by both sides that the waters of the springs, for a certain distance, naturally followed a marshy bed in a direction nearly parallel with the Cane Road until they reached a point marked A on Plan G. The two canals complained of by the

plaintiffs caught the waters of the Bambous Springs, the one close to the head of the spring, and the other near the point A, and led them in the direction of and across the cane road where they were employed in irrigating cane plantations to the right, looking towards the Battery Road.

The Plaintiffs alleged and sought to prove that in the absence of any diverting canal, and if allowed to follow their natural course, the waters of the springs from the point A diverged towards the left, and found their way by marshes and natural channels into the "Cocos," at a point nearly opposite that where a canal known as the "St. George Canal" takes water from that stream. On the other hand the Defendants contended that from the point A, if allowed to follow their natural course, the waters of the Bambous springs would continue to flow through marshy channels, in a direction generally parallel with the line of the Cane Road above mentioned, and would fall into the Aubin Canal, and, if that Canal did not exist, would find their way after crossing the Battery Road (at a point nearly midway between that at which the Cane Road stream intersects the Battery Road) into the Belle Eau.

Evidence at great length was led by both parties in support of their respective contentions. On the whole we consider that the weight of evidence is in favor of the Defendants. The evidence of the non-scientific witnesses is, numerically, pretty equal, but even on this evidence, we should have been inclined to adopt the view maintained by the Defendants, on the strength of the testimony given by Mr Commins, who for twenty years before 1871, was manager and one of the coproprietors of Gros Cailloox. This witness was originally called by the Plaintiffs, and at first deponed that part of the waters of what he knew as the "Bambous Springs" found their way into the Cocos, and the remainder into the Canal Aubin or River Belle Eau. Subsequently, however, this gentleman, after visiting this locality, was recalled and examined by the Defendants, when he explained that in speaking, in his former deposition, of the "Bambous Springs," he referred to a large group of springs of which those so designated in this suit were merely a part, the remainder being springs existing much further to the left and nearer to the "Cocos." The waters of these latter springs, he explained, fed the Cocos, but those of the springs in question here all naturally flowed in a direction parallel to the Cane Road and fell into the Aubin Canal and Belle Eau. He further stated that, in 1871, no channel such as that now running from the point A to the Cocos existed. This part of his evidence is strongly corroborated by the evidence of Mr. Emile Mérandon (the son of one of the Defendants and Manager of "Gros Cailloux,") and the other witnesses called by the Defendants, from which it appears that the channel by which, according to the Plaintiffs' contention, the waters of the "Bambous Springs" found their way from the point A to the Cocos is not a natural channel but an artificial Canal, constructed in 1874 for the purpose of irrigating certain cane plantations then for the first time made by the Defendants between the point A and that stream.

The conclusion to which we should thus have been inclined to come from the evidence of the non scientific witnesses, is greatly strengthened by the evidence of the surveyors examined in the cause. From the evidence of these gentlemen it appears that there exists a natural ridge or rising ground between the "Bambous Springs" and their bed, and the Cocos. Mr. Maillard, Sworn Land Surveyor, called by the Plaintiffs, admitted the existence of this ridge, but alleged that a portion of the waters of the Bambous springs found its way from the point A to the Cocos round, or through a natural depression in this ridge. He had not however scientifically verified the direction or elevation of this ridge. Mr. Reid, on the other hand, whose plan we have already had occasion to refer to, was examined on behalf of the Defendants and explained that he has carefully examined the ground in the neighbourhood of the Bambous Springs, and, by means of a large number of levels, taken on the spot, has been able to lay down on his plan the direction and contour of this ridge. Assuming the accuracy and fidelity of these levels, which were not disputed, there can be no doubt that the waters of the Bambous springs cannot, if left to take their natural course, find their way to the Cocos, but must, as contended by the Defendants, flow in a direction generally parallel with the cane road, and fall into the Canal Aubin and river Belle Eau.

In order to test the accuracy of the conclusions come to by Mr. Reid, we directed that observations should be made with the view of determining, by actual experiment, the course which the waters of the Bambous springs would naturally follow — an experiment the result of which would be entitled to great weight, as the natural formation of the ground does not show any signs of having been materially modified. This experiment was accordingly made by Messrs Maillard and Reid, who were respectively nominated by the parties, and the results obtained are now

before us in the Report of 13th June 1879, already referred to.

It is unnecessary to quote at length the passages of the Report which deal with this matter. It is sufficient to say, that, after carefully closing the artificial canals complained of by the Plaintiffs, at the points where they respectively take water from the natural bed of the springs, the waters were allowed time to collect and to follow their natural course. After an interval of five days, the result we found to be that the channel between the point A and the Cocos stream (which by the Plaintiffs was alleged to be the natural bed of the waters of the springs, and by the Defendants an artificial canal) had become quite dry no portion of the water finding its way by it to the Cocos, while the whole volume of water flowed through the marshes parallel to the cane road, and by small rills fell into Aubin canal. Messrs Maillard and Reid concur in reporting these facts, and they are further agreed that, if the bed of the Aubin canal were filled up, the whole waters of the Bambous springs would flow in the direction of the Belle Eau, and would probably fall into that river, if the ground were restored to its natural condition. Mr Maillard indeed, qualifies his opinion by stating that he considers that, before the mouth of the channel from the point A to the Cocos was cleared for the purpose of this experiment, the undergrowth at the point A so obstructed the flow of the water as to divert a portion of the waters into that channel and thence into the Cocos. As, however, we are satisfied from the evidence that this channel is not a natural but an artificial one, this reservation does not affect the results arrived at by the reporters.

These results, as we have seen, strongly corroborate experimentally the conclusions we would have been inclined to draw from the balance of the evidence both scientific and non-scientific; and demonstrate to our satisfaction that, with regard to this branch of the case, our finding must be that the waters of the Bambous springs are not naturally tributary to and do not form part of the Cocos, and accordingly that the Plaintiffs cannot successfully maintain that these springs were conceded to them by the Defendants under the judgment of 23rd February 1876. The Plaintiffs' action on this branch therefore, falls to be dismissed.

We must now turn our attention to the second point which arises in this suit, namely, the determination whether the waters of the Reservoir Springs are tributary to and form part of the Cocos stream, and, as such, were abandoned by the Defendants to the Plaintiffs under the said judgment?

The Reservoir springs are three springs which arise on "Gros Cailloux" Estate at a point about 250 feet from the "Cocos." The waters of these springs are now received and collected in a masonry work, Basin or Reservoir, constructed by the Defendants, and from it are led away by means of artificial canals and employed in irrigating cane plantations upon the Estate. The plaintiffs contend that these springs are natural springs which, prior to the erection of the Reservoir, and, on the ground that the Defendants' concession to them of the use and enjoyment of the Cocos, embraced all springs feeding that stream,—ask that the Defendants be ordered to destroy the artificial works constructed by them, in order that the waters may resume their natural course and flow into the "Cocos."

A great deal of evidence has been adduced on both sides with regard to whether these springs are natural or artificial, and as to whether they originally had a visible flow into the "Cocos." This evidence is conflicting on some points, but on others we think it leaves no room for doubt. Thus, we are satisfied that since 1872, that is four years before the judgment founded on by the Plaintiffs, matters have been in the condition in which they now are. In that year, the present Reservoir was constructed, and certainly since then until the date of the Injunction, no water from these springs found its way into the "Cocos." Further, the evidence shows that these springs are to some extent natural, but that the amount of water yielded by them has been vastly increased by digging, blasting, and other artificial operations. The date of these operations does not appear with precision, but they would seem to have been commenced some 15 years ago, and to have been further carried out in 1872.

The question for consideration is whether (on a sound construction of the terms of the judgment of 1876), it was the intention of parties, that the waters of these springs should be ceded to the Plaintiffs. The terms used are very general "all rights and pretensions "whatsoever to the waters or any part of the "waters of the River Cocos .....and to the "use and enjoyment thereof." If, however, this abandonment was intended to include waters of springs, which, (whatever their original destination may have been), certainly for several years previously had not formed part of the "Cocos" but had been caught, stored up, and used by the Defendants for irrigation, it seems natural to expect that some special mention would have been made

of the fact. The Plaintiff, Constant Nayl, states that, at the time when the judgment was signed, he was not aware that a Reservoir had been constructed for the purpose of catching the waters of these springs. But he admits that, directly after the judgment was signed, he visited the spot and saw the state of the matters. Now, if the intention of parties had been that the Reservoir springs were to be included in the concessions made, we should have expected that the Plaintiffs would, at once, have taken some steps to assert their rights, and would not have acquiesced in the state of matters until after the Declaration in this action had been filed, and only then come forward and raised the question by means of an amendment. These facts are not certainly favourable to the construction which we are now asked to put upon the judgment.

A part however, from this, and adopting, for the sake of argument, the construction put by the Plaintiffs on the terms of the judgment, vizt, that the words include an abandonnent not only of the waters actually forming part of the Cocos stream, but also of the waters of the springs which at some anterior period had fed that stream—have the Plaintiffs discharged the burden of proof resting upon them by showing that the waters of these springs at one time found their way into the Cocos ? On this point we think that the weight of evidence inclines towards the side of the Defendants. According to the evidence of Mr Commins who for 25 years prior to 1871 was coowner and manager of Gros Cailloux and who was called and examined on behalf of the Plaintiffs, prior to the digging and blasting operations already referred to, the Reservoir springs "did not exist ; at least they had no run. "There was a large marsh caused by the "water constantly lying there."

This statement by a witness who had certainly the best opportunity of knowing the exact state of the facts he depones to, and whose evidence is corroborated by several witnesses examined by the Defendants, appears to us to deserve very great weight, and we are disposed to accept it as faithfully representing the state of matters before the volume and condition of the springs was artificially modified. Assuming that it accurately represents the original state of matters, it conclusively negatives the contention that the works complained of now intercept waters which formerly had a visible flow into the "Cocos." It may very well be that some portion of the smaller quantity of water which originally collected in the marsh, found its way by subsoil percolation into the Cocos but we see no reason to believe that now when the state of things is merely superficially changed, the same amount of water from the largely increased volume yielded by the springs does not, in a similar manner, ultimately reach the stream.

To sum up, upon this branch of the case, assuming that the Plaintiffs under the judgment of 23rd February 1876 are entitled to claim as conceded to them springs which did not at its date flow into the Cocos stream, we are of opinion, on the evidence adduced, that the Plaintiffs have failed to establish that the Reservoir springs, at any time, had an internal and visible flow into that stream, or that the artificial operations of the Defendants and their predecessors, as a whole, have decreased the quantity of water which has probably always found its way by subsoil percolation into the stream. In these circumstances, our finding on this branch of the case also must be in favor of the Defendants.

We come now to the third and last issue raised by the Plaintiffs, vizt whether the Plaintiffs have established any wrongful cutting and destruction of trees and plants prejudicially affecting the right to the waters of spring B accruing to them under the judgment of 23rd February 1876. It will be remembered that, with regard to this point, the Defendants in their plea admit having cut down trees beyond the legal reserves, but deny that, within the reserves or around the spring or along the course of its waters to the Belle Eau, they have cut anything except a few Bamboo trees.

From the evidence there can be no doubt that a considerable number of trees and plants were by the orders of the Defendants cut in the neighbourhood of Spring B, but the deposition of Emile Mérandon with regard to the exact nature and extent of the cutting has not been successfully impugned. He says : "some time ago (the exact date does not appear, but is probably in July 1878 "alongside spring B^2 I cut down some trees. "I cut nine clusters of Bamboos within the "distance of ten feet from the spring (the "legal reserves.) Within the ten feet there "were no other trees. Round the spring, "and on the sides I cut no trees within a "limit of 180 feet on one side ; on another "side of 270 feet and on the third side of 55 "feet. On the fourth side the spring is 12 "feet from the mill canal." This statement was corroborated by Mr Aristide Brousse, guardian of woods and forests. He says : "I had been informed that a contravention "had been committed by the cutting of trees

" along one of the feeders of the Belle Eau. " I inspected the place. I found a certain " quantity of Bambous cut in the reserves of " that stream ; nothing but Bambous had been " cut in the reserves. All the place in the " neighbourhood had been cleared.

This being the state of facts disclosed by the evidence, we must enquire whether it shows a violation of the rights conferred by the judgment in 1876 on the Plaintiffs, and founds a claim of damages at their instance. It is well, in the first place, to determine what constitute the " Springs B " referred to in the judgment. The Plaintiffs contended that there were comprised under this designation *four* issues of water arising between the stables of " Gros Cailloux " and the River ; the Defendants admitted that two of these issues, namely those which have been designated " B " and " B^2 " respectively in this suit, were springs ; but denied that the others were springs ; alleging that they were merely leakages from the Mill Canal, and from a Canal and Basin near the stables respectively. A very great deal of evidence has been adduced on this point, which however has been materially elucidated by the Report of the Surveyors already referred to, dated 13th June 1879. From this document it apears, in the first place, that in the opinion of both these gentlemen, the issue of water known as B^3 is not a spring but merely a leakage from the Mill Canal ; and further that, of the issue known as B^4, all but a very small quantity, some 14/000ths of a *foot per* minute, is admitted by both Reporters to be due to leakage from the Stable Basin and Canal. With reference to this small quantity, a difference of opinion existed between the Surveyors : Mr. Maillard deeming it a natural spring and Mr. Reid considering it also to be leakage. We concur in the opinion of the latter gentleman, for the reasons given by him in the Report.

Confining our attention to springs B and B^2 (with regard to which, it is to be noticed, and to which, alone special arrangements were made at the date of the judgment for collecting and conveying their waters to the portion of the bed of the Belle Eau assigned to the Plaintiffs) can it be said, that the Defendants by their acts have infringed the judgment ? it contains no special stipulation for the protection of the springs and their water-course conceded to the Plaintiffs. In these circumstances, we are not prepared to hold, as contended by the Plaintiffs, that an indefinite restriction was by the judgment impliedly imposed on the Defendants' use of the ground adjoining the springs and their course. Had it been intended by the parties that these springs should be specially guarded, and the Defendants restrained in their enjoyment as owners of the neighbouring ground, we cannot doubt that this would have been expressly provided for by the judgment. In the absence of any provision, we must assume that all that was intended to be conceded by the Defendants or was understood to be granted by the Plaintiffs, was that the reserves determined by law for the preservation of rivers and streams should be respected, that is, in such a case as this, a distance of 10 feet around the spring and along its course on either side.

So construing the judgment, the only act which can be founded on as a breach of the agreement embodied in the judgment is the cutting of nine clumps of Bambous. No doubt this was a wrongful act on the part of the Defendants, tho', we are satisfied, in no way prompted by malice towards the Plaintiffs. Nevertheless, as wrongful, it will ground a claim for reparation for any prejudice thereby caused to the Plaintiffs. When however we come to enquire whether any damage has been shewn to have resulted to the Plaintiffs from the destruction of these Bambous we find that the only tittle of evidence adduced goes to negative such an idea. Mr. Vandermeersh, Civil Engineer, the only witness examined in connection with this point, says, " Bambou " trees are considered not good for preserving " streams, and we always give permission to " cut them. I don't consider that the cutting " of these Bambou trees could have in the " least diminished the water of B^2."—As the cutting of some Bambous within the legal reserves of this spring was specially admitted in the Defendants' plea, we must, in the absence of any conflicting evidence accept the statement of this witness as excluding the idea that the diminution which has certainly of late years taken place in the yield of this spring, can, in any degree be ascribed to the destruction of these Bambous by the Defendants.

On this final branch of the action our decision therefore must also be in favour of the Defendants.

The action is accordingly dismissed and the Defendants found entitled to costs.

SUPREME COURT.

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RETRAIT SUCCESSORAL.—RIGHT OF A CO-PROPRIETOR TO EXERCISE SUCH RETRAIT.—ART. 117 OF ORDINANCE 19 OF 1868.—ARTICLE 841 OF THE CIVIL CODE.

Held that according to the wording of Article 117 *of Ordinance* 19 *of* 1868 *the clear intention of the Legislator was to extend the principle enacted in Art.* 841 *of the Civil Code which was limited to co-heirs, to co-proprietors for the reimbursement of the price of undivided rights transferred in an immoveable property owned in common.*

That by the words "any of his rights" in Article 117 *of the same Ordinance, it was meant that a co-heir might reimburse the stranger to a succession who had purchased the right of another co-heir in any property forming part of that succession.*

That therefore, the right of reimbursement existed in our law, even when a co-heir had sold only his undivided share in one or several properties depending from a succession.

That Article 117 *being silent as to the time at which such reimbursement was to be made, it was only from the facts of each individual case that it could be known whether the co-heir who proposed to reimburse the stranger, had or had not renounced such right.*

That it could not be inferred from the facts of this case that the plaintiff intended tacitly to renounce her right of reimbursing the defendant.

The Court accordingly ordered that, if the plaintiff paid the defendant the sums in capital interests and costs expended by him on account of the sales made by him, she be subrogated into all his rights.

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BONAVICE,—Plaintiff

versus

MARTIN,—Defendant

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Before

His Honor N. G. BESTEL,—Acting Chief Judge

and

His Honor E. J. LECLÉZIO,—Acting Second Puisne Judge

—

H. GALÉA,—Of Counsel for plaintiff

W. LEBLANC,—Attorney for the same

P. L. CHASTELLIER,—Of Counsel for defendant

G. A. RITTER,—Attorney for the same

Record No. 19,888

26th August 1879

The plaintiff who is one of the heirs of the late Pierre Talbig alias Giblot, sues the defendant who is the purchaser of the rights of certain other heirs in several portions of land depending from the succession of the said Talbig and asks the Court to decree that she is entitled to the "retrait successoral" in this case, and that upon payment by her to the defendant of all sums of money in capital, interest and costs expended by him on account of the sales made to him, and to be by and in virtue of the judgment to be given, subrogated into all the rights of the defendant.

It is stated in the declaration that the rights in the four plots of ground sold to the defendant form the rights of inheritance of the parties who sold the same, in as much as the said four plots of ground composed the whole succession; but during the argument it was admitted by the plaintiff's counsel that this was an error and that there were other assets in the succession.

According to the latest French jurisprudence under art. 841 of the Civil Code, the right of "retrait successoral" cannot be exercised when, besides the property, a share of which has been sold, there are other assets in the succession, because it cannot then be said that the co-heir has sold his right in the succession, "cédé son droit à la succession" according to the very words of article 841; the same jurisprudence has established that the principle enacted in art. 841 cannot be enacted to cessions such as those of undivided rights in a conjugal community or of a partnership, or of a determined property belonging in common to several persons. "En effet, "says Demolombe, Traité des successions "vol. 4 No. 92, ce rètrait constitue, dans "notre droit moderne, une exception et une "véritable anomalie, et s'il n'en faut pas "moins lui donner sincèrement toute l'éten-"due d'application qu'il comporte, il est "nécessaire aussi de le renfermer dans les "limites que la loi lui a faites, et de ne pas "l'étendre à d'autres personnes ni à d'autres "droits que ceux auxquels s'applique le texte "de l'art. 841."

But art. 841 of the Civil Code, altho' not

expressly repealed by Ord. No. 19 of 1868, appears to have been at all events, considerably modified by art. 117 of our local Ordinance relative to sales of immoveable properties, the first paragraph of which runs thus: "Any person to whom a co-heir or co-"proprietor has transferred any of his right "in a common estate, may be desinterested "by the other co-heirs or co-proprietors, or "one of them, by reimbursement of the "prices of the transfer, of the legal interest "since the date thereof, and of the costs of "the transfer."

It has been argued for the defendant here that the words "common estate" used in the article meant either a succession or a partnership, but could not apply to immoveable properties depending from a succession and being only part of the assets thereof. We believe that the wording of the article conveys clearly the intention of the legislator to extend the principle enacted in art. 841 of the Code Civil which was limited to co-heirs by the French jurisprudence, to co-proprietors for the reimbursement of the price of undivided rights transferred in an immoveable property owned in common. We also believe that by using the words "any of his rights" the legislator meant that a co-heir might reimburse the stranger to a succession having purchased the right of another co-heir in any property forming part of that succession, otherwise we would come to this singular consequence: that an ordinary co-proprietor might reimburse the transferee of *his* co-proprietor, in an immoveable property belonging undividedly to them both, whereas a co-heir could not reimburse the transferee of his co-heir who would have ceded his rights in one or several of the immoveable properties belonging in common to them, as forming part of a succession having accrued to them. This consequence would constitute an anomaly and place the co-heir in a worse position than an ordinary co-proprietor, which is not admissible—a co-heir having still better motives than such a co-proprietor to exclude a stranger. We think that article 117 of the local Law of 1868 had for one of its objects to settle what was a vexed question among the French Commentators and in the french Courts viz: whether the cession of an undivided share in one or several properties depending from a succession gave the right of exercising the "retrait successoral," only it has settled it against the opinion of the majority of commentators and of the latest jurisprudence of the Court of Cassation, but it could hardly do otherwise having reenacted by the same clause the *retrait* of which Pothier speaks in his "Traité des Retraits" par: 2 "celui que quelques "coutumes accordent aux co-propriétaires par "indivis d'une chose, lorsque l'un d'entre "eux vend sa part indivise à un étranger"—which had been abolished during the revolution, and left aside by the framers of the Code Civil.

We are therefore of opinion that the right of reimbursement exists in our Law such as it is since 1868, even when a co-heir has sold only his undivided share in one or several properties depending from a succession.

But when is such right to be exercised? In this case it appears that one Antoinette Bonavice in whose rights the plaintiff now stands, called the defendant before the Master of this Court as a party to the Licitation asked by her of the very plots of ground, shares of which he had purchased about 3 years ago from certain of plaintiff's co-heirs, and it has been argued on behalf of defendant that the plaintiff had thereby recognized his rights of co-proprietor, acquiesced in the transfers made by her co-heirs, and renounced her right of reimbursement.

Art. 117 of Ordinance 19 of 1868 is silent as to the time at which the reimbursement is to be made. It is only from the facts of each individual case that it can be gathered whether the co-heir who proposes to reimburse the stranger to a succession, has or has not renounced such right.

In this case proceedings in Licitation were begun before the Master by Antoinette Bonavice in July 1877—and the defendant was called by her as a party to the Licitation, as holder of the rights of some of her co-heirs—the proceedings were stayed in December of the same year, upon the application of third parties who claimed the land as their own, until the Supreme Court do adjudicate upon their claim. It was in April 1878 that the plaintiff entered her present action for the purpose of being allowed to exercise her right of "retrait successoral." Do those facts amount to a tacit renunciation on the part of the plaintiff to exercise such rights. The delicate question of knowing whether the "retrait successoral" may be exercised, pending the preliminary operations of a partition, and more especially when the transferee has been called as such by the co-heir who wishes afterwards to exclude him, has been fully examined by Demolombe Vol. IV, Nos. 126-127—and we agree with him when he says: "Il faudrait d'autres actes pour que l'on pût "induire, contre les héritiers, une renoncia-"tion tacite au retrait successoral, il faudrait "des actes desquels cette renonciation résultat

" nécessairement; or, la règle générale qui " nous paraît pouvoir être proposée est que " ces actes doivent être tels qu'ils soient in- " compatibles avec l'exercice ultérieur du re- " trait, en ce sens qu'ils ne permettent plus " de remettre le cessionnaire en lui rembour- " sant seulement le prix de la Cession, au " même état que si la cession ne lui avait " pas été faite."

It is the established jurisprudence that the " retrait successoral " may be exercised so long as there has been no definite partition, unless there has been express or tacit renunciation, and in 1872 the Court of Chambéry has ruled, as a consequence of this jurisprudence that it can be exercised even after a provisional partition between co-heirs and the transferee of their co-heir (Dev. 72, 2, 77.) Without expressing any opinion upon this last decision, we think that the facts of the case now before us are not such as to lead us to presume that the plaintiff intended tacitly to renounce the rights of reimbursing the defendant and we order that, if within the delay of four weeks from this day, she pays to defendant, the sums in capital, interests and costs, expended by him on account of the sales herein before mentioned, she be subrogated into all his rights.

As the points decided in this case are of a somewhat delicate nature and came, we believe, before the Court for the first time since Ord. 19 of 1868 was enacted, and also on account of the circumstances of this case, we order that the defendant shall pay to plaintiff only the half of her costs.

SUPREME COURT

—

ACTION IN CANCELLATION OF CERTAIN SALES ON THE GROUND THAT THEY WERE SIMULATED. — FRAUDE A LA LOI. — CONTRE LETTRE. — LOSS OF THE SAME. — PAROLE EVIDENCE.—ART. 1348 OF CIVIL CODE.

In this case the plaintiff asked the Court to decree that three sales made by him and one of his sons to the defendant, another of his sons, were simulated sales, and that the properties sold still belonged to him in as much as on the day of the sale the defendant had signed a " contre lettre " in which he acknowledged that the sales were simulated and that in reality the properties sold were the plaintiff's, and would be returned to him when required, or in the event of plaintiff's death would become the property of the Mahomedan church of which plaintiff was the high Priest.

The plaintiff further averred that the " Contre lettre " was stolen from a press where it had been placed, and that from that time the defendant began to pretend that he was the lawful owner of the properties which the plaintiff had enjoyed after the said sales and up to the loss of the " Contre lettre "; and that the defendant refused to sign a sale of these properties to the representatives of the Mahomedan church.

The plaintiff therefore moved to prove by parole evidence the facts alleged by him on the ground that the acts attacked as simulated contained a " fraude à la loi," and contended that he was, at all events, entitled to prove the loss of the Contre lettre and the contents thereof.

Held that if parole evidence is admissible to to prove simulation in a deed, when such simulation has been resorted to to commit a " fraude à la loi," it is because in such case it is considered there is a moral impossibility of obtaining a written proof of the real agreement, and in this case it would not be said that there was any such moral impossibility in as much as when the sales were made by the plaintiff and his son to the defendant, a contre lettre was signed by the purchaser in favour of the Vendors.

Held that the plaintiff's notice of facts not having alleged in a precise manner that the loss of the Contre lettre was the result of a " cas fortuit " as required by Art. 1348 of the Civil Code, the Court could not allow parole evidence to be adduced " in hoc statu " to prove the loss alleged, and as a consequence the contents of the lost document; but seems, that if the notice of facts contained more particulars in such respects, parole evidence might have been adduced.

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SOBDAR,—Plaintiff

versus

SOBDAR & OTHERS,—Defendants

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Before

His Honor A. G. ELLIS,—Acting First Puisne Judge

and

His Honor E. J. LECLEZIO,—Acting Second Puisne Judge

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W. NEWTON,—Of Counsel for Plaintiff
N. ARNAUD,—Attorney for the same

E. GALLET,—Of Counsel for Defendants
F. SIMONET,—Attorney for the same.

Record No. 19,459

26th August 1879.

The Plaintiff in this case is a High Priest of the Mahomedan creed in this Island and a proprietor; he sues his son Taïob Bacosse Sobdar, one of the Defendants, and asks the Court to decree that three sales of properties, situate in Port Louis and fully described in the declaration made by plaintiff and his other son Myrdia Ally Bacosse Sobdar to Taïob are simulated sales, and that the said properties still belong to the plaintiff, and further (in case the said sales be considered as valid) to cancel the said sales on account of the smallness of the purchase price " vilité de prix."

Before the Court the plaintiff did not insist upon the question of " vilité de prix " but prayed that he be allowed to prove by witnesses the facts alleged by him and mentioned both in the declaration and in the notice of facts.

The plaintiff's allegations are that he was the owner of four plots of ground situate in the District of Port Louis, that by an act of Notary Durand Deslongrais dated the 12th May 1874, he sold the bare ownership of the first and second properties to his son Myrdia Ally, and that on the same day the latter signed a " contre-lettre " acknowledging that this sale was a simulated one and that in reality the plaintiff remained the owner of the bare ownership (nue propriété). This " contre-lettre " has been produced, and it contains in addition to the above acknowledgement the following declaration: " Et je " déclare en outre qu'en cas de mortalité la " vente de la nue propriété passée à mon " profit reviendrait à l'Église pour son entre- " tien."

The plaintiff further alleges that on the 26th August 1875, Myrdia Ally being very ill, and fearing he should soon die, sold the bare ownership of the said two properties to his brother Taïob, and that on the same day he, plaintiff, also sold to the said Taïob the bare ownership of the two other properties remaining to him. The two acts of sale were drawn up by the same notary (Mr Jollivet) and the plaintiff avers that on the same day the defendant Taïob signed a " contre lettre " in which he acknowledged that the sales made to him were simulated, and that in reality the properties sold belonged to his father, the plaintiff, and would be returned to him when required; or in the event of his death, would become the property of the Mahomedan Church where the plaintiff officiates. The said sales having been made " with a view to equally (sic) secure to the " Church to which the plaintiff and his fa- " mily belong, the enjoyment of the said pro- " perties."

It is also stated in the declaration that the " contre-lettre " given by the defendant Taïob Sobdar to the plaintiff was placed by the latter in a press (armoire) with other papers belonging to him and that Taïob well knew that the said " contre-lettre " was in the said armoire. That the plaintiff after the said sales continued to enjoy the above properties as his own. That about the month of November 1876, the said " contre-lettre " was stolen from the said press, and in the same month and year Taïob began to pretend that he was the true and lawful owner of the said properties, and that, although often requested by plaintiff, he has refused to sign a sale of the properties to the representatives of the Mahomedan Church.

Such are the principal facts which the plaintiff wishes to be allowed to prove by parole evidence. The motion has been objected to by the defendant Taïob who declares the sales were bonâ fide sales made before notaries public, that he had paid the prices stipulated in the deeds and that he is the lawful owner of the bare ownership of the several properties, the usufruct of which still belongs to his father.

We see from the Record that when the case came a first time before the Court, the two brothers Mirdia and Taïob were examined on their personal answers, but the plaintiff's counsel when arguing the question of parole evidence before us, did not rely at all upon the answers made by the two defendants, and rested that part of his case entirely upon a point of law.

He contended that the allegations made by plaintiff were of such a nature that it was clear that the acts attacked as simulated, amounted to a " fraude à la loi " their effect being either to create a preference in favor of one of the sons to the detriment of the other, or to constitute a donation in favor of the Mahomedan Church to the prejudice of the two sons of the plaintiff, that in either event the sales were made in fraud of the law of succession, and that in France an exception was made to the rule prohibiting parole evi-

dence as a means of shaking the validity of written contracts in favor of cases in which " fraude à la loi " was averred to have taken place. In support of his contention the plaintiff quoted *S.V.* 1867, 1, 245,—1875, 1. 15 *Larombière under art.* 1348.

We have carefully examined the above decisions of the Court of Cassation and the circumstances under which they were given, and we do not think they are applicable in the very dissimilar circumstances of this case. In Larombière 1, 19 under Article 1348 we find that the ground upon which, when " *fraude à la loi* " is averred, the Courts in France allow parole evidence, is the moral impossibility in which the party to whose prejudice such fraud is practised, finds himself of obtaining a written proof of the simulation. " Demander en effet en pareille circonstance, says Larombière, une reconnaissance mutuelle de simulation frauduleuse, ce serait manifester clairement l'intention de ne contracter que pour la forme, et de se réserver pour en user plus tard, le moyen d'éluder l'engagement en démasquant la fraude qu'il contient envers la loi..... Ce ne serait plus une simulation si les parties elles-mêmes prennent soin de rédiger, parallèlement à l'acte frauduleux et simulé un autre acte qui en rétablit la vraie cause et le véritable caractère. A la différence des simulations ordinaires toute idée de contre-lettre est donc irréconciliable avec la rédaction d'un acte destiné, par suite d'un concert commun, à couvrir une fraude à la loi. Ainsi nous avons raison de dire qu'il y a impossibilité morale d'en avoir une preuve écrite, et dès lors nous nous trouvons pleinement sous l'application de l'exception consacrée par l'article 1348."

Here we find on the contrary, that when the sales were made to Taïob Sobdar by his father and his brother a " contre-lettre " is alleged to have been signed by the purchaser in favour of plaintiff; it would therefore appear that there was no moral impossibility of obtaining a written proof of the real agreement between parties and of the simulation contained in the sales. We cannot consequently assimilate the present case to one in which the legal presumption must be that it was not possible for the plaintiff to procure a written proof of the obligation contracted towards him.

But it has been further alleged by the plaintiff that the " contre-lettre " given to him by the defendant Taïob, was placed in his press where it remained with other papers to the knowledge of Taïob until the month of November 1876, when it was stolen.

We would have been disposed to allow the proof by witnesses of the loss of this document if the notice of facts had specified with more details the circumstances accompanying the disappearance of the " contre-lettre; " do these circumstances amount to the " cas fortuit imprévu et résultant d'une force majeure " spoken of by parag. 4 of art. 1348? In the absence of facts upon this point we cannot say. Mr Laurent, the much esteemed Belgian jurisconsult, who has examined very fully this question of the proof of the loss of a contrelettre, (Vol. 19 No. 562-64) and who is of opinion that the possession and loss of a " contre-lettre," like those of any other title, and as a consequence the contents of the lost document, may be proved by witnesses, states however that it must be clearly shown (and of course distinctly alleged) that the loss is the result of a *cas fortuit* as required by art. 1348; in other words, it must be alleged and proved how and when the loss has been suffered either through violence or fraud, or some unavoidable event. Larombière, in section 42, under article 1838, explains very clearly what should be done. " Cette preuve à faire comporte elle-même la nécessité d'établir précisément le cas fortuit allégué. Il faut démontrer par quel accident l'acte instrumentaire a été perdu ou a péri. On doit donc repousser comme moyen indirect d'éluder les prohibitions de la loi, toute allégation d'un cas de perte quelconque, sans caractère précis, vague, indéterminé. Comme l'est de sa nature, le cas de perte dans son domicile, au bureau des hypothèques ou de l'enregistrement, dans le cabinet d'un avoué, d'un avocat, ou même dans un ménagement ordinaire. Ce n'est pas là le cas fortuit, imprévu et résultant d'une force majeure dont parle l'article 1348. Ce n'est pas non plus l'accident déterminé, particulier dont le bon sens et la raison demandent, avant tout, la preuve précise."

We must not forget that we are asked here to set aside notarial deeds in which it is stated that certain properties have been sold and paid for, upon the allegation that the purchaser has given to the vendor a written declaration, now lost, which is the very reverse of what is contained in the authentic deeds produced.

We must have before us very precise data upon which the existence and loss of that written declaration may be verified before we can accept oral evidence with regards to its terms.

The notice of facts in this case being insufficient upon this point, we cannot in the present state of the procedure, allow the proof of the disappearance of a " contre-lettre "

such as it is alleged, and until the possession and loss of the document are alleged and proved as the law requires to the satisfaction of the Court, we must also refuse to allow the proof of its contents by parole evidence.

Costs reserved.

SUPREME COURT

—

CLAIM OF A SHOP IN POSSESSION OF THE ASSIGNEES OF A BANKRUPTCY.—A PETITIONING CREDITOR DOES NOT REPRESENT THE BANKRUPTCY.—HIS LIABILITY.

Held that, in this case, the plaintiff had clearly proved that the shop claimed by him was bought and paid for by him and was therefore his property.

That the defendants could not be put out of cause in as much as they had put in pleas denying the plaintiff's allegations of ownership and averring fraud against him, and that having been unsuccessful on these pleas the plaintiff was entitled to judgment against them.

That the fact that a creditor had presented a petition for an adjudication of Bankruptcy did not invest him with any official capacity to represent the Bankruptcy.

That therefore in this case, the defendants as petitioning creditors, having taken an active attitude, were personally liable and ought accordingly to bear a portion of the costs.

The Court gave judgment for plaintiff with half the costs against Capeyron & Delange and the other half against the Bankruptcy of Ah-Hon.

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WONGLYKE,—Plaintiff

versus

CAPEYRON & DELANGE,—Defendants

—

Before

His Honor N. G. BESTEL,—Acting Chief Judge

and

His Honor E. J. LECLÉZIO,—Acting Second Puisne Judge

—

T. L. JENKINS,—Of Counsel for Plaintiff
E. LAURENT,—Attorney for the same

E. PELLEREAU,—Of Counsel for Defendants
A. ROLANDO,—Attorney for the same

Record No. 20,137

1st September 1879

In this action the plaintiff who is a Chinese trader, sues the official assignee of the Bankruptcy Ah-Hon, and Messrs Capeyron and Delange who were the petitioning creditors in the said Bankruptcy, and prays the Court to decree that the plaintiff is the sole and exclusive owner of the shop situate in Farquhar street, Port Louis, which has been taken possession of by the official assignee as being part of the Bankruptcy Ah-Hon.

The action is brought in consequence of certain proceedings in the Court of Bankruptcy, originated by an affidavit of Mr J. Delange of the firm Capeyron & Delange, by which the Court was informed that the Bankrupt Ah-Hon had two shops one in Church street, the other in Farquhar street, that the shop in Farquhar street is now alleged to be the property of one Wonglyke a Chinaman.

That the said Wonglyke can give information concerning the person, trade, dealings and estate of the Bankrupt.

That the said Wonglyke, as he has been informed and verily believes is suspected to have or supposed to have some estate of the said Ah-Hon in his possession.

That it is necessary that the said Wonglyke be examined before this Court concerning his trade with the said Ah-Hon.

Thereupon a summons was issued calling upon Wonglyke to appear before the Court to be examined and give evidence concerning the person, trade dealings or estate of the Bankrupt.

In obedience to this summons, the plaintiff appeared before the Court and was examined as a witness. Other witnesses were also called and examined by the Counsel of Messrs Capeyron & Delange who afterwards moved the Court to send the official assignee in possession of the shop, a motion against which Wonglyke who was not assisted by Counsel, and who, called no witnesses, did not shew cause. The Court ordered the official assignee to take possession provisionally the said possession to become definitive if within eight days the said Wonglyke has not taken before the

competent Court proper proceedings to establish that he is the real owner of the said shop.

Within this delay, this present action was entered. The official assignee in his plea in answer to the declaration, after stating that although as official assignee he has used every means to obtain it, he is not in possession of sufficient information either to admit or reject the plaintiff's claims and in consequence he abides by the decision of the Court. The other defendants in their plea, Messrs. Capeyron & Delange, denied and traversed the plaintiff's allegations and specially averred the shop has been and now is the property of the Bankrupt Ah-Hon, who did fraudulently place it under the name of plaintiff a short time before keeping out of the way and concealing himself in order to defraud his creditors.

That, even admitting but only for argument's sake that, by the judgment to be given in this cause, the said plaintiff be declared the owner of the said shop, the said defendants Capeyron & Delange most formally contest and deny that the plaintiff has or may have both in law and in equity any right of entering against them any action or actions whatsoever, either in the shape of action in damages or otherwise.

There was also a plea to the jurisdiction of this Court, but this has been already disposed of by judgment of twenty sixth day of June last.

After issue joined between the abovenamed parties, Mr. J. Delange who had been elected Creditors' assignee of the bankruptcy Ah-Hon was by Judge's order made a party to the suit and in answer to the declaration he has filed pleas similar to those of the defendants Capeyron & Delange.

The plaintiff's case is that the shop claimed formerly belonged not to Ah-Hon the bankrupt but to another Chinaman of the same name, from whom he purchased it for a sum of $ 2.038.35½ which was entirely paid over to the vendor.

Messrs. Capeyron & Delange and J. Delange as, we have just seen, contend on the other hand that the shop really belonged to Ah-Hon the Bankrupt and was only placed under the name of plaintiff for the purpose of defrauding the Creditors of the bankrupt.

The first question which we have to decide, is whether there was such a purchase as the plaintiff avers.

Upon this point we have heard the evidence of the plaintiff himself, of the Chinaman Ah-Hon, who is represented as having been the vendor and of two other Chinaman who acted as witnesses to the transaction. They all swear that about the end of October 1878, the plaintiff bought the shop from Ah-Hon for a sum of $ 2,038,35½ which was the value fixed by an inventory, of the goods in the shop, and the price was really paid by plaintiff to the vendor in two instalments, first a sum of $ 1,000 on the twentieth of October last year and the balance $ 1,038.35½ on the thirtieth of the same month, and when the inventory was completed the licence was transferred to the plaintiff.

As further proof of the transaction, the plaintiff produced three documents written in Chinese characters, to which are annexed duly authenticated translations. They purport to be the inventory of the shop and receipts for the two sums paid by plaintiff to Ah-Hon. The receipts bear the names of Ah-Hon the vendor and of Athow and A. Marie witnesses and all these documents were identified before us by them.

It was also proved to us by the plaintiff that a notice of the transfer of license by Ah-Hon to Wonglyke the plaintiff was published in the Government Gazette of twelfth of Octaber last (1878), that the transfer itself was effected at the Receiver General's office on the thirtieth of the same month, that the sign board was altered into the name of plaintiff on same day, that the plaintiff paid the rent (Rs 110 a month) of the premises occupied for the shop from first November (date of the first receipt produced before us) up to the time when he was ejected by the official assignee.

For the defendants no direct evidence was led to rebut the evidence of the plaintiff and his witnesses with regard to the sale of the shop, or to support the allegation of fraud in their plea. But it was attempted to prove that the shop really belonged to the bankrupt; altho' it was managed by the other Ah-Hon and in the argument our attention was called to circumstances which it was contended rendered the plaintiff's story impossible or to say the least extremely unlikely.

We have considered these points and we are not satisfied that they are of sufficient importance to lead us to the conclusion that the witnesses who swear (all of whom have been carefully cross examined by the Defendants) have committed wilful perjury and that the receipts and inventory produced are false instruments fabricated for the purpose of giving

colour to a fraud, nor are we satisfied that the shop was the property of the Bankrupt. It appears to us that the evidence of the defendants on this point amounts to this. That the bankrupt gave himself out as the owner of that shop and was in the habit of buying goods which he said were for the shop in Farquhar street.

This is perfectly consistent with the hypothesis that the Bankrupt, who, it is proved had a shop in Church street and another in Grand Port, falsely represented himself to the brokers &c. with whom he dealt as the owner of the shop kept by the other Ah-Hon and that for the purpose of obtaining further credit. Besides, we do not think that in the view we are disposed to take of the case, it is necessary for us to decide whether the shop belonged to the Bankrupt or to the plaintiff's vendor. We find that this latter kept the shop, that he paid the rent, that the license and sign board bore a name which was his own, altho' it happened also to be that of the Bankrupt and that there was nothing to warn the public and parties dealing with him that he was only keeping the shop in the capacity of agent for the Bankrupt as contended by the defendants.

Such being the position of plaintiff's vendor with reference to the shop, we find it proved that the plaintiff bought and paid for the shop, that he took possession and remained in possession until ejected by the official assignee.

We are of opinion that these facts being proved to our satisfaction, we must adjudge that the plaintiff is the owner of the shop in dispute.

We have now only to dispose of the last plea of the defendants which is to the effect that even admitting the facts, no action in damages or otherwise lies against them. We have of course in this no opinion to give now as to the competency of any action in damages by the plaintiff against the defendants, and it appears to us that the plea is to be considered only in connection with the motion which was made by the Counsel of Messrs Capeyron & Delange at the end of the argument, that they be put out of the cause with costs.

We do not think we can assent to this application.—As we have pointed out the proceedings which led to the plaintiff's shop being taken possession of by the assignees were originated by Messrs Capeyron & Delange.—They have besides after this action was brought, and when an opportunity was given to them to disown any responsibility in the matter, put in pleas denying the plaintiff's allegations of ownership and averring fraud against him. On these pleas, they have been unsuccessful and we think that the plaintiff is entitled to Judgment against them.

It was also argued that they acted in the capacity of petitioning creditors and cannot therefore be personally liable in this action.—We do not think that the fact that a creditor has presented the petition for adjudication of Bankruptcy invests him with any official capacity, to represent the Bankruptcy.—This is properly the function of the Assignees,—to which the defence to this action might have been left by Messrs Capeyron & Delange.—Instead of doing so, they have taken an active attitude in the proceedings and should, we think, bear at least a portion of the costs.

We will accordingly award Judgment for plaintiff, with half the costs against Messrs Capeyron & Delange. The other half to be borne by the Bankruptcy Ah-Hon, represented by the official and Creditor's assignees.

SUPREME COURT

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MOTION FOR LEAVE TO APPEAL TO PRIVY COUNCIL.—VALUE OF MATTER AT ISSUE.—INCOMPETENCY OF THE COURT HERE TO DECIDE WHETHER THE PLAINTIFF HAD ACQUIESCED IN THE JUDGMENT GIVEN AGAINST HIM. — ORDER IN COUNCIL OF 1831.

Held that, in the circumstances of this case, the Court could not refuse the Petition for leave to appeal to the Privy Council as the plaintiff's interest in the matter at issue was of greater value than £ 1,000.

That it is not competent for the Court here, whose functions, as defined by the Order in Council of 1831, *were merely ministerial to decide whether the plaintiff had or had not forfeited his right of appeal, in withdrawing from the Registry of the Supreme Court the money tendered by him in payment of the premiums due by him, after judgment given against him by the Court.*

The Court therefore granted the leave prayed for without costs.

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HEWETSON,—Appellant

versus

THE NORTHERN ASSURANCE COMPANY,—Respondents

—

Before

His Honor A. G. ELLIS,—Chief Judge

and

His Honor E. M. WOOD,—Acting Third Puisne Judge

—

W. HEWETSON,—For himself

P. L. CHASTELLIER,—Of Counsel for Respondents

E. DUVIVIER,—Attorney for the same

Record No. 19,897

19*th September* 1879

These cases involved a question as to the sum payable for premiums upon a policy of Assurance for £ 10,000. The plaintiff tendered to the defendants the amount that he contended was due in respect of the premiums in question, and his tender having been refused paid the amount into Court, and summoned the defendants to shew cause why the tenders made by him should not be declared to be good and sufficient and further why the defendants should not be ordered to take out the money paid into Court and give acquittances to the plaintiff for the premiums in respect of which it was paid.

The Court dismissed the summonses and the plaintiff now comes before the Court with a petition for leave to appeal to Her Majesty in Council.

It is not denied on behalf of the defendants that the effect of the judgment of the Court is to cause the policy to lapse, and the plaintiff's interest in the policy is of greater value than £ 1000; so that so far as concerns the value of the property involved these actions are unquestionably appealable; but it is contended that the plaintiff by his conduct subsequent to the adverse decision of the Supreme Court has forfeited his right of appeal.

It appears that the plaintiff shortly after the Court had given judgment withdrew from the Registry of the Court the sums deposited leaving at the same time with the Registrar a notice by which he affected to reserve to himself all rights of appeal competent to him—he has since attempted to deposit the money again, but the Registrar in consequence of a notice from the defendants has declined to accept it.

It is now contended that the conduct of the plaintiff amounts to an acquiescence in the Judgment of the Court, and that by removing the subject matter of the original action, he has estopped himself from appealing and the Court is asked to dismiss his Petition for leave to appeal.

The plaintiff, as we understand, contends that the reservation of his rights made at the time of the withdrawal is sufficient to negative the idea of acquiescence; and that his demand that the tenders made by him should be declared good and sufficient is separable from that part of his claim which relates to the payment of money into Court.

We are of opinion that we cannot in the circumstances refuse the Petition for leave to appeal. Whether or not the principle of acquiescence as defined by the French Courts applies to judgments of this Court and whether or not the conduct of the plaintiff in the present case amounts to an abandonment of a part or the whole of his claim against the defendants are questions of some nicety that we do not feel entittled to decide. The Royal Order in Council 1831 gives an absolute right of appeal to any person against whom a decision involving property to the amount or £ 1,000 has been given, and we do not think it is competent for us to decide the question as to the plaintiff having forfeited his right to appeal.

The plaintiff having presented his petition within the prescribed delay and satisfied us that the amount at stake exceeds £ 1,000, in value, it appears to us that the functions of the Court as defined by the order in Council are merely ministerial and that it is not before this Tribunal that the objections of the defendants should be urged.

The objections of the defendants may afford good ground for an application to the Privy Council to quash the appeal, but we do not consider them to be of such a nature as to enable us to refuse the present petition, we accordingly grant the plaintiff the leave prayed for. No costs.

SUPREME COURT

—

ACTION FOR GOODS SOLD AND DELIVERED.—COMPENSATION.—AVEU JUDICIAIRE.—ARTICLES 1291 & 1356 OF THE CIVIL CODE.

Held that the principle laid down in Article 1356 of the Civil Code with regard to the "aveu judiciaire" did not apply to the deposition of a party to a suit, who is examined on oath as a witness in his own behalf; and that the testimony of such a party must be regarded in the same light as the testimony of any other witness, and that his opponent was entitled to ask the Court to accept so much of it as was favorable to him and to discard the remainder.

Held that claims which could readily be liquidated without delay or litigation were "liquides" in the sense of Article 1291 of the Civil Code; and that, in this case, the plea of compensation put forward by the defendants was well founded.

Held lastly that, in the circumstances of the case, the plaintiff had proved that he had supplied goods to the defendants to the amount claimed by him; but that the defendants had established that the debt due by them had been extinguished by compensation with a larger amount due to them by the plaintiff.

Action dismissed with costs.

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AUGUSTE TOUSSAINT.—Plaintiff

versus

BRÉARD & WIFE,—Defendants

—

Before

His Honor A. G. ELLIS,—Chief Judge

and

His Honor E. M. WOOD,—Acting Third Puisne Judge

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E. PELLEREAU,—Of Counsel for Plaintiff
G. NEWTON,—Attorney for the same

L. ROUILLARD,—Of Counsel for Defendants
P. E. DE CHAZAL,—Attorney for the same

Record No. 12,608

19th September 1879

This is an action in which the plaintiff seeks to recover payment of the sum of Rs. 1,921.42 c.(or as it is incorrectly styled in the declaration $ 960.71 c.) being the value of certain goods which the plaintiff supplied between 1860 aud 1862 for the use of the Estate Savannah, which then belonged to the defendant Mrs Bréard, on the order of her manager Mr Darné. In support of this claim the plaintiff produced accepted accounts and Bons for the various items supplied, and was examined as a witness in his own behalf.

The defendants did not deny that Mr Darné was their duly authorized manager, nor that the goods were ordered by him, and employed for the use of their Estate, but contended that the plaintiff's claim had been extinguished by compensation with a like amount of a large debt due to them by the plaintiff, as rent for a store belonging to Mrs Bréard, and occupied by the plaintiff from May 1860 to July 1863.

In reply the plaintiff joined issue and pleaded that the claim for rent founded on by the defendants had been the subject of a settlement between the parties, and further, that any claim of this nature could not be made good by way of substantive action.

Subsequently an action was entered by Mr and Mrs Bréard against Toussaint for payment of a sum of $ 1,950 (or more corectly Rs. 3,900) being the sum alleged to be due by Toussaint for rent of the store above mentioned from May 1860 to July 1863 (39 months) at the rate of $ 50 (Rs. 100) per month.

The two actions were heard at the same time. No additional evidence was adduced in the second suit, the evidence in the first action being by consent imported into the second. We shall proceed to dispose of the action at the instance of Toussaint in the first place.

In support of their claim for rent which the defendants relied on as having extinguished by compensation the amount due for furnishings made by the plaintiff to the Estate Savannah, the defendants mainly relied on the evidence elicited from the plaintiff in cross examination. In the course of his cross examination Toussaint admitted that he had occupied the store belonging to Mrs Bréard from 1860 to 1863, at a monthy rent of $ 50. He further stated that the sum which

had so become due by him, had been the subject of a settlement between him and Mr Bréard acting on behalf of his wife, in the course of the year 1863. That at that date he held bons for wood and lime supplied to Savannah, and for money advanced to the Estate : that he had handed over to Mr Bréard vouchers to the amount of the rent due by him for the store, and that a formal settlement had thereupon been drawn up and handed to him by Mr Bréard. His books, which contained entries relating to the supply of the goods, the vouchers for which he alleged had been given in payment of the rent, had, he explained, been removed on the occasion of a larceny from his office, which occurred in 1869. Further the settlement had, by order of the Court in a previous case, been handed over to the late Registrar of this Court, and had not been returned to his attorney along with the other papers produced in the action—and though search had been made, no trace of it could be discovered at the Registry.

On this evidence the defendants contended that by the admission of the plaintiff they had sufficiently established the fact of rent having become due by the plaintiff for occupation of the store, and that the statements of the witness that a settlement had taken place with regard to the sum due, were highly improbable, quite unsupported by any extraneous evidence, and should be rejected by the Court.

The plaintiff, on the other hand, contended that the statements made by him in the box, constitued an " aveu judiciaire " which (article 1356 Civil Code) could not be split up, and the admission that rent had become due by him, and the allegation that a settlement had been come to with regard to it, must be accepted or rejected as a whole. In the latter case the defendants had failed to establish the existence of the claim for rent on which they based their plea of compensation. In the former case the sum due for rent had been the subject of a settlement in 1863, and could not therefore be opposed to the plaintiff's present claim.

We have carefully considered this contention, and we are of opinion that the principle laid down in article 1356 of the Civil Code, with regard to the " aveu judiciaire " do not apply to the deposition of a party to a suit who is examined on oath as a witness in his own behalf. If an admission made by a party to a suit is put in evidence against him by his opponent as a part of the case of the latter or if his opponent calls and examines him on personal answers, we can understand that the whole admission so far as it relates to the same facts must be taken together, and that the party who relies on it makes the whole of it his own evidence and so is equally bound by the favorable and unfavorable parts. But when a party gives evidence as a witness in his own behalf, we are clear that his testimony must be regarded in the same light as that of any other witness, and that his opponent is entitled to ask the Court to accept so much of it as is favorable to him and to discard the remainder.

In the present instance we are inclined to attach credit to the statements of the plaintiff with regard to his having occupied the store for about the period alleged by the defendants, and at the alleged rent. It is clear that the plaintiff had no motive for making these admissions unless they were true, and we accordingly think that the existence in 1863 of a claim for rent due by the plaintiff to the defendants is established. But when we come to consider the statements of the plaintiff with regard to the alleged extinction of that claim, we cannot but remember that here his evidence is that of a highly interested witness, which must be closely scrutinized. The explanations which he gives of the loss of his books which would doubtless have contained traces of the furnishings which he states were set off against the rent, and of his inability to produce the alleged settlement, are not of a kind to be readily accepted in the absence of corroborative evidence which, we think, might have been obtained. Unsupported as the plaintiff's statements are, and keeping in view their unlikely character, and the fact that they are made by a highly interested witness, we are not disposed to accept his evidence as sufficient proof that the debt for the rent of the store has been extinguished. We must accordingly hold that the defendants have established that in 1863 the plaintiff was indebted to them in a sum of upwards Rs 2,000 for rent of a store occupied by him, and that, on the other hand the plaintiff has failed to establish his allegation that a settlement was come to with regard to this sum.

In these circumstances, the defendants contend that by the effect of compensation, from the moment of the existence of the mutual debits and credits, the debt due to the plaintiff, which he now sues on, was extinguished *in toto*, by the larger sum due by him to the defendants, and the debt due by them reduced *pro tanto* (art. 1291 of the Civil Code.)

In reply to this contention the plaintiff maintained that the debt due to the plaintiff

not being " liquide et exigible " within the meaning of the article cited, could not be the subject of compensation. In support of this view it was argued that the *bons* sued on by the plaintiff did not determine the price of the goods which were furnished by him, and that therefore the amount of his claim was not determined, and further that the identity of the debtor under the *bons* was doubtful, as was shewn by the fact that an action had been in the first place entered against Darné, the defendants' manager, personally.

With regard to the latter point, we do not think that there could have arisen any real contestation. The goods furnished were, it is admitted on both sides, supplied for the use of the Estate of Mrs Bréard, and on the order of her authorized manager, and we do not think that the mere fact that the plaintiff was so ill advised as to sue that manager personally in the first instance can be regarded as throwing doubt upon the real debtors having been the defendants, to the effect of precluding them from pleading compensation. As to the objection that the amount under the *bons* was not determined it is well settled that claims which can readily be liquidated without delay or litigation are " liquides " in the sense of article 1291. The goods furnished here were lime, wood and guano. With reference to the lime, we observe that the furnishings of this kind are vouched by an accepted account for supplies made by the plaintiff between June 1860 and March 1861, at the uniform price of $ 1.25 the cask, and by 25 bons ranging between April 15, 1861 and June 21, 1862 in which no price is specified. As we think it was understood by both parties that all furnishings of lime were to be at the uniform price mentioned in the accepted account on which footing indeed the plaintiff has estimated the sum due to him, we have no hesitation in holding that the amount due for furnishings of this article must be deemed a liquidated debt. In the order given by Darné on which the wood was supplied (27th January 1861) we observe that the plaintiff is expressly requested in sending the article, to mention the price, and we must presume, as against the plaintiff, that this was done, and the sum due on that account thereby liquidated. No question can arise on this point with regard to the guano, as the order expressly mentions the price. Accordingly we cannot sustain this objection to the plea of compensation.

On the whole matter, therefore, we find on the one hand that the plaintiff has proved that between 1860 to 1862 goods were supplied by him to the defendants to the amount alleged: but on the other hand we find that the defendants have established that the debt so due by them has been extinguished by compensation with a larger amount due to them by the plaintiff for rent.

The plaintiff's action must therefore be dismissed with costs in favor of the defendants.

BAIL COURT

LICITATION. — MEMORANDUM OF CHARGES AND CONDITIONS OF SALE.—VENDOR BOUND BY THE SAME.

Held that a party to a licitation who receives part of the sale price of the immoveable sold, is bound by the description given of it by him in the memorandum of charges and conditions of sale.

That, in this case, the plaintiff, as one of the vendors, was bound as against the purchaser (the defendant) and could not turn round against her and evict her from the land which he professed to sell and for which he had been paid.

Action dismissed with costs.

PERRET,—Plaintiff

versus

WIDOW BROUDOU,—Defendant

Before

His Honor E. M. WOOD,—Acting Third Puisne Judge

E. GALLET,—Of Counsel for Plaintiff
A. DESVEAUX,—Attorney for the same

T. L. JENKINS,—Of Counsel for Defendant
E. LEBLANC,—Attorney for Defendant

Record No. 6,548

25th September 1879

In this case the plaintiff asked for a judgment of the Court ordering the defendant to remove a certain building belonging to her which is alleged to have been built in part upon the plaintiff's land.

It appears that the property now occupied by the defendant and which adjoins that of the plaintiff formerly belonged to one Donnie Bontemps and was devised by her to the present plaintiff and three others. In 1868 a sale by licitation was prosecuted by one of the legatees, and the defendant became the purchaser, the plaintiff being a party to the proceedings and receiving one fourth of the purchase money.

It is not denied that the building in question encroaches to a certain extent upon the plaintiff's land according to the measurements given in the respective titles of the plaintiff and defendant; but it is contended that the plaintiff having been one of the vendors of the property is bound by the description in the conditions of sale and cannot therefore maintain this action against the person who purchased from him, and the defence of ten years prescription is also set up. The plaintiff's counsel contended that under the terms of the conditions of sale the plaintiff owed no guarantee to the defendant and was, therefore, in position to evict her if his titles warranted such eviction and that the 10 years prescription had heen interrupted by a survey which brought to the defendant's knowledge the real extent of the property.

In the view I have taken of this case it is not necessary to examine the latter contention.

The building which gives rise to the present action mentioned in the memorandum of charges as standing upon the land sold, and the second article of the conditions of sale says that the purchaser is to take the property such as it stands and without any guarantee as to the more or less extent of land. The property is also described as being bounded on one side by the land of Alcide Perret. The vendors by this memorandum of charges clearly professed to sell the land upon which the building stood whatever its extent, and represented to the purchaser that no part of the building stood on the land of Alcide Perret.

It is admitted that the building in question is now in the same position as it was at the time of the sale by licitation. In these circumstances it appears clear to me, both on principle and authority, that Alcide Perret who was a party to the proceedings of licitation and who received a fourth part of the purchase price, is not to be heard for a moment to say that the property was misdescribed, and that as a matter of fact one of the defendant's buildings encroaches on his land. As one of the vendors he is bound as against the purchaser by the description which induced the purchase, and he cannot now turn round and evict the purchaser from the land which he professed to sell her, and for which he has been paid.

The plaint is dismissed with costs.

BAIL COURT

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ACTION FOR WORK AND LABOR DONE, AND GOODS SOLD AND DELIVERED. — PAROLE EVIDENCE.—ADVANCES MADE.—ARTICLES 1341 CIVIL CODE AND 256 OF CODE OF CIVIL PROCEDURE.

In this case the plaintiff claimed the sum of Rs 650 *for work and labor done for, and goods and merchandize sold to the defendant.*

This latter pleaded that on an adjustment of accounts between him and the plaintiff no sum whatever was due, as the sum claimed from him had been more than covered by advances which he had made from time to time, and adduced parole evidence to prove that on several occasions the plaintiff had received advances amounting to Rs 340.

The plaintiff having objected to the admissibility of this evidence on the ground that it was contrary to the general rule laid down by Art. 1341 *of the Civil Code, and also because the defendant had not brought himself within the exceptions created by Articles* 1347 *and* 1348.

The defendant replied that parole evidence having been ushered in, both parties had a right to establish their allegations by witnesses, and in support of this contention relied on Article 256 *of the Code of Civil Procedure.*

Held that the right conferred on a defendant by Article 256 *of the Code of Civil Procedure was the right to prove contrary facts without previous notice given of such facts, and leave obtained to prove them, and not the right to prove facts by means of evidence which would otherwise have been incompetent.*

That, in this case, the defendant could competently prove, in virtue of Article 256 *of the Code of Civil Procedure, facts negativing the alleged contract entered into between him and the plaintiff, but he could not, in answer to the plaintiff's claim under the contract, establish by parole evidence, payments of more than* 150 *francs made in*

extinction of the obligation arising out of the contract, in as much as he had not brought himself under one or other of the exceptions to the general rule laid down by Article 1341 *of the Civil Code.*

The Court, therefore, rejected the evidence of the advances made as incompetent, and found that the plaintiff, out of the Rs 620 *claimed, had established only a debt of Rs* 280.

Judgment was entered accordingly in the sum of Rs 280 *with District Court costs only against the defendant, as the plaintiff had grossly exaggerated her claim, and had succeeded in establishing less than half the amount sued for.*

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ROSE MILAN,—Plaintiff

versus

SULTAN ABDALLAH OF JOHANNA.—Defendant

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Before

His Honor A. G. ELLIS,— Chief Judge

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H. GALÉA,—Of Counsel for plaintiff
G. BOULOUX,—Attorney for the same

T. L. JENKINS,—Of Counsel for Defendant
E. LEBLANC,—Attorney for the same

Record No. 6,514

3rd October 1879

In this case the plaintiff, a milliner in Port Louis, sues His Highness Sultan Abdallah of Johanna for a sum of Rs. 650, being the alleged amount of an account due to her for work and labour done for, and goods and merchandize sold to the defendant. No objection to the jurisdiction of the Court was taken by the defendant, who appeared by counsel and filed pleas in answer to the plaintiff's demand. An objection was however taken to the competency of establishing by parole evidence the allegations contained in the plaint. To meet this objection the plaintiff produced certain documents and called and examined the defendant, before a Commissioner appointed by me, on his personal answers. After having maturely considered the documents founded on, and the Report of this examination I was opinion that the defendant had brought himself within one of the exceptions to the general rule, excluding parole evidence in such matters, and accordingly repelled the objection and allowed witnesses to be examined.

Witnesses were accordingly heard on both sides. On behalf of the plaintiff, evidence was led to show that the work mentioned in the account and the goods there referred to were done for and furnished to the defendant. The plaintiff and some of her workwomen were examined and stated that the various articles of clothing mentioned in the account were made for and delivered to the defendant. The plaintiff swears that the price agreed on between her and the Sultan were as follows: For 11 garments (the stuff for making which was given by the defendant) Rs. 9.18 each or in all Rs. 101. For the stitching of 13 shirts Rs. 2 each or Rs. 26 in all, and for making three flanel garments Rs 13. In corroboration of the plaintiff's statement of the amount of these prices, we have the deposition of one of her workwomen (Widow Thomy), but the other witnesses do not mention the fact of any price having been agreed on before hand. There were also produced the Business Books of the plaintiff, but these were evidently kept in such a careless and unsystematic way that I cannot attach much importance to them as evidence.

The keeper of the Sultan's Robes was examined on behalf of the defendant, and stated that, with the exception of 11 garments, which he states were to be made for Rs. 8 each, no price was fixed before hand for the work to be done by the plaintiff.

The plaintiff further deponed that the prices mentioned by her were for the work alone, and that it had been agreed that the materials, thread, buttons, lining &c. should be paid for separately, and were accordingly so entered in the account to the amount of Rs. 196. This statement seems a most improbable contention, and tho' I have carefully examined the evidence of the plaintiff's workwomen, I find nothing to corroborate it. Entries of charges for these furnishings appear indeed in the plaintiff's books, but, as I have said, I am not disposed to allow much weight to books kept as these appear to have been.

On the other hand, we have the evidence of the keeper of the Sultan's Robes that in the only case in which he admits that a price was agreed on before hand, vizt: the 11 garments, (in making up which all but a very small quantity of the small furnishings charged must have been employed) the stipulated

price was to include all but the cloth of which the garments were made which was furnished by the Sultan. We have further abundance of evidence from skilled witnesses that the prices stipulated, and which the plaintiff says were for the making alone, would be very high prices indeed for making the garments and furnishing all the minor materials employed in their fabrication.

In these circumstances, the result to which this conflicting and most unsatisfactory evidence leads me, is to admit the prices charged and said to have been agreed on before hand for the garments, flanel clothes and sheets, but to reject as not sufficiently proved, the items amounting in all to Rs. 196 charged for the minor materials furnished, which I have no doubt were included in the price agreed on before hand for the making of these various articles. The result will be that (discarding for the moment *item* 3 of the account) the plaintiff has established her claim to Rs. 140 out of the Rs. 336 charged by her.

We come now to deal with the evidence as to the third item of the account, which is as follows : " seven pieces silk Rs. 314."

The only evidence which we have to establish the allegation that the sum charged was the price agreed to by the Sultan on purchasing the silk is the statement of the plaintiff herself, which is not corroborated by the workwomen she called as witnesses. Here also indeed,the Books were relied on as showing the footing on which the sale was made, but I have already said that little or no credit can be attached to them. On the other hand there is the assertion of the keeper of the Sultan's Robes that the silk was sent to the Sultan as a pledge for the repayment of advances made by him. We have further the evidence of the person from whom the Plaintiff obtained the silk for the Sultan. This witness states that the price at which he sold this inferior kind of silk to the Plaintiff was Rs. 2 per ell, giving the plaintiff a profit upon the transaction of about 150 *per cent.*

I think that, looking to all the circumstances, the probability is that the silk was sold to the Sultan,but I do not think that the practically unsupported evidence of the plaintiff is sufficient to establish that such a grossly exorbitant price as that charged, was agreed to by the Defendant on purchasing. Assuming that there was no stipulated price, I do not think the circumstances such as to warrant me in allowing the Plaintiff more than a moderate profit on the sale, and shall accordingly fix the price due by the Defendant on this account at Rs. 140.

I find therefore that out of the Rs. 650 claimed by the Plaintiff for work done for and goods furnished to the Defendant, the evidence establishes a debt of Rs. 280.

The Defendant however, when examined on personal answers by the Plaintiff, alleged that on an adjustment of accounts between him and the Plaintiff, no sum whatever was due, the sum in which he was indebted to the Plaintiff having been more than covered by advances which he had made to her from time to time. In support of this defence parole evidence was adduced before the Master. The keeper of his Robes was examined as a witness and stated that on the 1st January, he handed the Plaintiff Rs 20 on account, on the 14th January Rs 200 and on the 18th Rs 120.

The competency of this evidence was objected to by the Plaintiff on the ground that parole evidence of these advances was contrary to the general rule laid down by Article 1341 and the Defendant had not brought himself within the exceptions created by Art. 1347 and 1348. In reply to this objection, the Defendant contended that the door having been opened to parole evidence, both parties were entitled to establish their allegations by witnesses, and, it was competent to the Defendant to prove by witnesses, facts which rebutted the conclusions to be drawn from the allegations of the Plaintiff. In support of this view, Article 256 of the Code of Civil Procedure was cited and relied on.

I have carefully examined this point, and have come to the opinion that the objection taken by the plaintiff must be sustained : the article cited by the defendant entitles the party against whom facts are sought to be established to preve " faits contraires." But what is the right conferred on the defendant by this provision ? From the terms of the article and of those preceding it, it is clear that it is the right to prove contrary facts without previous notice given of such facts, and leave obtained to prove them—not the right to prove facts by means of evidence which would otherwise have been incompetent.

Again what is to be understood by " la preuve contraire ? I apprehend the expression to apply to proof of facts which negative the allegation of the plaintiff, but that it does not warrant the defendant's contention that he is entitled to prove facts which could not otherwise be proved by parole evidence, and which are in no way contrary or contradictory to the plaintiff's allegation. The plaintiff founds her claim on work done and goods furnished to the defendant. In answer to the defendant's objection to parole evidence as excluded by

Article 1341 of the Civil Code, the plaintiff established what the Court has held to be a "commencement de preuve par écrit," rendering her allegations "vraisemblable" and was allowed to call witnesses to establish the contract. Now, I have no doubt that Article 256 of the Code of Civil Procedure makes it competent to the defendant to prove facts negativing the alleged contract, but I am clear that it does not entitle him in answer to the plaintiff's claim under the contract to establish by parole evidence, payments of more than 150 francs made in extinction of the obligation arising out of the contract. In order to entitle him to prove such payments by witnesses he must, as a preliminary step, bring himself under one or other of the exceptions to the general rule laid down by Art : 1341 Civil Code, and, not having done this, I must reject the evidence as incompetent. (Boitard, Leçons de Procédure Civile Vol I § 480 p 472 ; Carré et Chauveau, Procédure Civile Vol 2 p. 525 *Ques* 989 *bis*.)

The Defendant further urged that this was a Commercial case, and that, on this ground parole evidence might be admitted. I do not think that this contention will bear the test of examination, or that this case, in which a trader sues a non-trader for work done and furnishings made to him, can in any way be regarded as a case falling within the jurisdiction of the Commercial Tribunals as defined by Article 631 and following of the Code de Commerce, and to which the exceptional rules as to proof in Commercial cases are applicable.

For the reasons just explained, I am of opinion that the parole evidence adduced to establish the advances founded on by the Defendant must be discarded, and judgment will accordingly go in favor of the Plaintiff for the amount above mentioned. Rs 280.

As I am satisfied that the claim advanced by the Plaintiff was a grossly exorbitant one, and as the Plaintiff has only succeeded in establishing her demand to considerably less than one half of the amount sued for, I shall find her entitled only to costs taxed according to the District Court Tariff.

SUPREME COURT.

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CLAIM OF BILLS OF LADING EXPRESSED IN FRANCS.—RATE AT WHICH RUPEES ARE TO BE ESTIMATED IN SUCH A CASE.—PAR OF EXCHANGE.—RELATIVE VALUE OF FRENCH AND COLONIAL CURRENCIES.

Held that in law, freight due in Mauritius under Bills of Lading granted at Marseilles by the Master of a French vessel, and therein expressed in Francs, was payable at the real Par of Exchange.

And the Court found, in fact, that, in the absence of data enabling it accurately to arrive at the real par, the nearest approximation thereto was the number of Rupees which, at the date when the freight became due, would have been required to purchase a draft on Paris at 90 days sight for the number of Francs due under the Bills of Lading.

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PIPON, ADAM & Co.,—Plaintiffs*

versus

CHAPUY,—Defendant

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Before

His Honor A. G. ELLIS,—Chief Judge

His Honor L. COX,—Acting Second Puisne Judge

and

His Honor E. M. WOOD,—Acting Third Puisne Judge

—

G. GUIBERT,—Of Counsel for Plaintiffs
G. KŒNIG,—Attorney for the same

P. L. CHASTELLIER,—Of Counsel for Defendant
G. A. RITTER,—Attorney for the same

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Record No. 20,109

10*th October* 1879

Several of the points at issue between the parties in this suit have been dealt with by the Court, in its judgment of 18th July last. There still however remains for decision one important question, namely : on what footing are Rupees to be estimated in extinction of an obligation arising under Bills of Lading granted at Marseilles by the Master of a French vessel stipulating payment of freight

* *Vide page* 104.

of so many Francs *per* ton for the conveyance of goods to Mauritius ? The plaintiffs who hold the Bills of Lading in question, maintained that payment is to be made in Rupees at par of Exchange, and the defendant, to whom, as master of the vessel freight is payable, contended that he is entitled to receive Rupees at the current rate of Exchange.

No decision directly in point has been cited in argument on either side, but the learned counsel for both parties have referred to the works of eminent English, American, and French jurisprudents. The opinions of the French commentators quoted are strangely conflicting, and while the majority of them appear to countenance the views urged by the Defendant, the unqualified, terms in which they are expressed render it doubtful whether the question has been examined by them with their usual minuteness and discrimination. Story and Burge on the other hand treat of this question in considerable detail and lay down principles which appear to us to be sound and in accordance with the decisions of the Courts in cases which raised questions more or less nearly connected with that now before us.

As we have said, the issue involved in this case has not, so far as we can ascertain, been the subject of a judicial decision ; but some of of the English cases cited at the Bar and referred to by Story and Burge appear to lay down with great clearness and precision, principles which have a most important bearing upon this case. The Courts in England have repeatedly been called on to determine the rule to be applied in converting into sterling, debts expressed in the Currency of a Foreign Country and payable in that Country. In such cases (*Scott* v *Bevan* 2. Barn : and Adolphe 78 ; *Delayal* v *Naylor* 7 Bingh : 460, and *Cash* v *Kennion* Vesey 314) The Current rate of Exchange has been held to supply the true principle for fixing in Sterling money the amount due for debts expressed in foreign Currency. These decisions however, have turned on the fact that the debt is *payable in the foreign Country* in the Currency of which it is expressed. The clear principle laid down being, that, wherever a Creditor sues for his debt, he is entitled to such a sum in the Currency of the Country where the suit is brought as will enable him to receive the amount due in the place where it is payable (*Story Conflict of Laws* § 310). If therefore, in this case, the freight claimed were payable in Marseilles, we have no doubt that, in accordance with these decisions, the Defendant would be entitled to recover so many Rupees as would enable him to purchase a Bill of Exchange on France for the number of francs due to him—in other words the Current rate of Exchange would furnish the rule of Conversion.

In the case before us however the debt though expressed in francs is payable *in Mauritius*, and as there is no question of enabling the Creditor to receive elsewhere the amount due to him, the reason which led to the adoption of the Current rate of Exchange in the English cases referred to does not exist in this instance. The principles regulating these decisions however, when carefully examined seem to us to afford material assistance in deciding the case before us. As we have said, the reason why in the English cases the Current rate of exchange was adopted as the rule of Conversion was because the debt was payable abroad. Consequently if drafts on the place of payment were at a premium the Creditor was entitled to receive the sterling equivalent of his debt *plus* the premium required to buy a draft on the place of payment. If on the other hand drafts on the place of payment were at par or at a discount, the Creditor was entitled to receive in the former case the equivalent of his debt in sterling, and in the latter, the equivalent less the discount at which drafts were selling. As in this case however, the debt is payable in the place where the suit is brought—the question is not affected by the price of drafts—and we are of opinion that theoretically the creditor is only entitled to receive the equivalent in Rupees of the number of francs due to him—that is to be paid in Rupees at the par of Exchange without reference to whether exchange between this country and France is favorable or unfavorable to Mauritius.

But how is the value of Rupees at par of Exchange to be determined ? The plaintiffs maintained that the par value of a Rupee is to be estimated by the relative amount of silver which it contains as compared with a franc—assuming that both coins contain the amount of silver fixed by law. They therefore contended that all that the defendant could demand was such a number of Rupees as would give pure silver to the amount contained in the number of francs due. If the value of the franc depended solely on the amount of silver which by law it should contain, there might have been room for this pretention. But this is not so : The value of francs is also, and just now most materially, affected by the fact that they may be exchanged for gold coin. In the present depreciated state of silver this element in the value of francs is of vital importance, as, but for it, the purchasing power of the franc would have immensely decreased. Owing however to the double standard of value, and the power of

obtaining a gold "pièce de vingt francs" for 20 silver francs, the franc has a fixed value independent of the fluctuating price of silver. If we were to adopt the plaintiff's contention, we should be acting on the assumption that the value of the franc depended entirely on the amount of silver which it contains, and throwing out of account the value which it deserves from the fact that it is exchangeable for gold at a fixed rate. Such a course, which would be tantamount to regarding the par between Rupees and Sterling as being regulated by the relative amount of silver contained in a Rupee and in a shilling (a pretention which the Court has already held to be inadmissible) we cannot adopt.

Rejecting this suggestion, how shall we estimate the par between Rupees and Francs? It is true that by a complicated calculation we might ascertain the relative value of Rupees at the present price of silver and of francs, taking into account their convertibility into gold, but this we have no hesitation in holding to be at once an inexact mode of reaching the par of exchange and too intricate and complicated a solution of the question to meet the requirements of commerce. But can we not arrive at the true par of exchange by reference to the current rate of exchange.

When a draft on London for £ 100 is selling at Rs 1200, exchange is commonly said to be at 20 o|o premium. To arrive at the par of exchange is it not sufficient to deduct this premium? To this we answer most decidedly not. The phraseology popularly adopted here is utterly misleading and inacurrate. This so called 20 o|o premium is calculated on the basis of a Rupee being worth 2 s. stg., a value which as we have seen it has not either in fact or in law. What is erroneously described here as premium of exchange is but slightly affected by the causes which regulate exchange, and is mainly due to depreciation in the value of silver. To how small an extent, causes affecting exchange properly so called contribute to what in this Colony is popularly termed the high rate of exchange now current, is apparent when we bear in mind that the current rate of exchange can never vary, for any considerable time, from the real par by more than the cost of transmitting coin (Mc Cullock's Commercial Dictionary Ed. 1848 *voce* "Exchange" p. 556) which cost we find by the evidence of Mr Matson, the accountant of the Oriental Bank, is merely some 2 o|o. The current rate of exchange at any given date may exceed the par by this amount. But does the current rate of exchange exceed the par by this amount, or by any and if so what portion of it? To this question the evidence adduced does not enable us to reply. Indeed from the constant fluctuation of the silver market and the peculiar circumstances of the Colony it seems extremely doubtful whether data exist by which the actual divergence of the current rate of exchange from the real par can be ascertained.

In these circumstances, as we are not in a position to ascertain with precision the exact par equivalent of francs in Rupees, we should in the absence of any means for arriving at a closer approximation to the par of exchange) have been prepared to adopt the current rate of exchange as the rule of Conversion here. As we have seen, the current rate of exchange can never for any considerable period diverge from the real par by more than 2 *per cent*, and Story *lays* it down that "when there is no established par" as is the case here "the rate of Exchange may justly furnish a standard as the nearest approximation of the relative value of the Currencies." (Conflict of Laws § 310).

We think however, that the evidence adduced in this case by the defendant himself, establishes that he is not entitled to payment in Rupees at the Current Rate of Exchange and enables us to approximate more nearly to the equivalent in Rupees of the amount due by the plaintiffs for freight as expressed in Francs in these Bills of Lading. If the evidence showed that exchange on France was favorable or adverse to Mauritius to a certain definite amount, we could not, we think, shut our eyes to this fact and adopt the current rate of exchange as the rule of conversion. For we should thereby be giving what was proved to be more or less than the equivalent due. Now, we consider that we are to some extent, in that position with regard to this case. The plaintiffs maintain that the Current rate of Exchange is highly unfavorable to Mauritius and, while the defendant contended that it was not so unfavorable as alleged, the witnesses called by him do not deny that it is unfavorable, but appear in their evidence to assume that as a fact. Further, we think that there are to be found in the evidence, data for computing the extent to which the Current rate is admittedly unfavorable. One of the witnesses called by the defendant who has the benefit of a long and most extensive experience as a merchant in this Colony—Mr Ambrose—states that, in his opinion, the nearest equivalent to the amount due in Francs is the number of Rupees required to buy a draft at 90 days sight. In other words he admits that the current rate is unfavorable to Mauritius by a percentage equal to at least 90

days interest on the amount. This evidence is concurred in and adopted by other witnesses examined by the defendant, and we think it must be taken as showing conclusively as against the defendant that the current rate of exchange is at least to that extent above par, and that a sum calculated on the footing mentioned will give a nearer approximation to what is due, than the current rate of exchange. If, on the one hand, the sum to which the defendant will thus be found entitled is more than the real par of exchange to which alone he is entitled theoretically, that is due to the impossibility of arriving at a closer approximation. On the other hand, the evidence given by his own witnesses excludes the defendant from maintaining that the sum thus arrived at is less than what is due to him.

We therefore hold, in law, that the freight due in Mauritius under the Bills of Lading, and therein expressed in Francs, is payable in Rupees at the real par of Exchange, and in the absence of data enabling us accurately to arrive at the real par, we find in fact that the nearest approximation thereto is the number of Rupees which at the date when the freight became due, would have been required to purchase a draft on Paris at 90 days sight for Francs to the number due under these Bills of Lading.

We accordingly find for the defendant, with interest for the date of the declaration in this action. Further as he has practically been successful on all the points raised in the action, we find him entitled to costs.

SUPREME COURT

—

ACTION IN PAYMENT OF AN ACCOUNT FOR MONEYS ADVANCED.—MOTION FOR A COMMISSION TO EXAMINE WITNESSES ABROAD.—INCOMPETENCY OF EVIDENCE OF HUSBANDS CALLED AS DEFENDANTS FOR AUTHORISATION OF THEIR WIVES.—ARTICLES 1 AND 2 OF ORDINANCE 7 OF 1871.

In this case the plaintiffs claimed from the defendants, owners of a Sugar Estate, the balance of an account for moneys advanced to that estate. The defendants moved for a Commission to examine two witnesses resident in France; the proposed witnesses who were the husbands of the defendants, had themselves originally been called as defendants, but merely for the authorisation of their wives.

The plaintiff objected to the Commission being issued on the ground that the witnesses proposed were not competent witnesses in virtue of Ordinance 7 of 1871. *To this the defendants replied that although they could not give evidence each on behalf of his own wife, they could do so, however, each on behalf of the wife of the other.*

Held by the Court : 1o. *That husbands who are called as defendants in a case, merely for the authorisation of their wives, cannot give evidence each on behalf of the wife of the other.*

2o. *That a husband who has originally been put in a case as defendant for the authorisation of his wife, can be a competent witness in such case, if after the death of his wife he is put in the cause afresh in his own behalf.*

3o. *That looking to the language and arrangement of the two first Articles of Ordinance 7 of* 1871 (*Law of Evidence*) *the exceptions contained in the first article are not applicable to the second article.*

4o. *That, in this case, one of the witnesses proposed, having been personally put in the cause, was a competent witness under Art. 2 of Ordinance 7 of* 1871.

The Court therefore ordered a Commission to issue to take his evidence at Bordeaux.

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ELIAS, MALLAC & Co.—Plaintiffs

versus

FOURCADE THE WIFE & ORS,—Defendants

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Before

His Honor A. G. ELLIS,—Chief Judge

and

Hi Honor E. M. WOOD,—Acting Third Puisne Judge

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P. L. CHASTELLIER,—Of Counsel for Plaintiffs
A. COLIN,—Attorney for the same

E. PELLEREAU,—Of Counsel for Defendants
J. MERCIER,—Attorney for the same

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Record No. 19,783

10th October 1879

This is an application by the defendants for a Commission to examine as witnesses two gentlemen who are resident out of the jurisdiction of the Court. It is resisted by the plaintiffs on the grounds that there has been unnecessary delay in making the application, and that the persons sought to be examined are not competent witnesses.

We do not think, looking to the circumstances of this case that there has been any unreasonable delay, and we should therefore not be disposed to refuse the application on this ground, but before we make any order for a Commission it is necessary that we should be satisfied that the evidence to be taken is likely to be material to the issue to be tried.

It appears that the wives of the proposed witnesses were originally the defendants in this suit, and that the witnesses were called as defendants for the authorisation of their wives, and the plaintiffs' counsel contends that the 3rd paragraph of art. 1 of Ord. 7 of 1871 renders them incompetent to give evidence.

The defendants' counsel, as we understand, does not deny that according to the settled jurisprudence of this Court the fact of their being parties to the cause in this character does not make them competent witnesses under art. 2; but it is contended that although they cannot give evidence each on behalf of his own wife they can nevertheless do so each on behalf of the wife of the other.

This contention is founded on the wording of § 3 of the 1st article of Ord. No. 7 of 1871 which provides that a husband shall not be a competent witness for his wife, but does not expressly declare a husband to be an incompetent witness on behalf of some person who is a co-defendant with his wife, and it has been argued that as the exception does not in terms apply to such a case the enabling words in the 1st paragraph of the article make the husband a competent witness.

The language of the article of the Ordinance in question is borrowed almost entirely from two English Statutes known respectively as Lord Denman's and Lord Brougham's Acts. The third section of the latter act provides inter alia as follows: "But nothing herein contained shall render any person who in any criminal proceeding is charged with the Commission offence..... competent or compellable to give evidence for or against himself..... or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife." Previous to the passing of these acts the law of England with regard to the evidence of husbands both in civil and criminal proceedings to which their wives were parties was much the same as the law in force in this colony before the passing of Ord. No 7 of 1871, and the English authorities upon the construction of the above cited section of Lord Brougham's acts are therefore in point in the present case. It is worthy of notice that for some time after the passing of this act it was supposed that co-defendants in criminal cases were rendered competent witnesses for each other for the very reasons that have been argued by the counsel for the defendants before us, and the opinions of the most eminent English writers as well as the decisions of the Courts both in England and Ireland would have been authorities directly in favour of the defendant's contention had it not been decided in a late case by the unanimous judgment of 16 Judges that the act did not render co-defendants competent witnesses for each other (*Regina* v. *Payne* 41 *L. J. M. C.* 65). This decision proceeded on the broad ground that the legislature could never have intended by a mere exception to make such a radical change in English law as to allow a prisoner on his trial to be called as a witness, but in the later case of the *Queen* v. *Thompson* reported in the same volume it was held that the wife of one of several prisoners jointly indicted and tried together could not be called as a witness on behalf of any of the other prisoners. As the wording of the latter part of the 3rd section of Lord Brougham's act is almost identical with that of the paragraph that we now have to consider, this decision appears to us to be an authority directly adverse to the defendants' contention. It is true that the case was decided on the authority of the *Queen* v. *Payne*, but there are several other decisions of the English Courts given both before and after the passing of Lord Denman's and Lord Brougham's acts to the effect that the wife of a prisoner cannot be called as a witness for and against a co-defendant tried at the same time as her husband because her evidence must to a certain extent affect the case against her husband. We do not go so far as to say that the principle laid down in these decisions would be applicable in all civil cases. The chief reason for excluding the evidence of a husband or wife is that his or her evidence if calculated to affect the interests of the other spouse is likely to be biassed. We can well imagine cases in which the interests of the co-defendants might be entirely separate and distinct, and it may be that in such cases the husband or wife of one of two co-defendants might be an admissible witness for or against the other. But what is the nature of the

present action. The two defendants are alleged to be co-owners of an estate and to have entered into a joint contract with the plaintiffs for the management of that estate and they are alleged to have jointly broken that contract. They have not severed their defences but have both appeared by the same attorney and pleaded jointly the same pleas. The evidence of which notice is given in paragraph 6, and which the proposed witnesses are stated to be able to rebut must affect the interests of each defendant equally and in fact it is impossible to imagine any material evidence which could affect the case of one and not the case of the other. It seems to us therefore that the principles on which the evidence of spouses has been excluded by the English Courts in criminal cases are applicable to such cases as the present and that the decisions on the construction to be put on that part of Lord Brougham's act from which the last paragraph of article 1 of Ord. No. 7 of 1871 is copied are authorities that we should follow. We think that if we were to admit the deposition of either of the proposed witnesses we should be permitting a husband to give evidence for and against his wife within the meaning of Ordinance No. 7 of 1871 and if the parties to the record were the same as they were at the commencement of the action we should refuse to make any order for a Commission. We find however that since the commencement of this suit one of the defendants has died and her husband who before her death was in the cause for the authorisation of his wife has been put into the cause afresh in his own behalf and as guardian of his minor children. In these circumstances we think that his evidence is admissible under art. 2. It may appear most illogical to hold that a man who was originally disqualified from giving evidence by reason of the interest that he had in the cause owing to his wife being a party, has since been rendered competent by having his interest in the cause increased by being himself made a party, but this is the necessary result of the provisions of Ord. No. 7 of 1871. We are clearly of opinion looking to the language and arrangement of the two first articles of this Ordinance, that the exceptions contained in the 1st article are not applicable to the 2nd article, besides the point has already been decided by this Court in the case of de Bissy and ors cited in the case of Vigoureux v. Jacob. (Piston's Report 1874, 51.)

We consider that the defendant Pellereau is a competent witness in the cause and we therefore order that a Commission do issue to take his evidence at Bordeaux and also that of the witness mentioned by Mr Chastellier.

SUPREME COURT

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ACTION IN PAYMENT OF A SUM OF MONEY AMOUNT OF AN OBLIGATORY WRITING.—PRELIMINARY OBJECTION TO THE COMPETENCY OF SUPREME COURT TO HEAR THE CASE.—POWER OF DISTRICT JUDGE OF SEYCHELLES UNDER ORDINANCE 22 OF 1853 TO TRY CASES BETWEEN PARTIES RESIDING THERE ONLY.

Held by the Court, in this case, that the plaintiff was entitled to sue all the defendants in one action before the Supreme Court, and that the action as laid, could not have been instituted before the District Court of Seychelles, as all the defendants were not resident there.

The Court therefore ordered the case to be proceeded with on the merits and reserved the question of costs.

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LOIZEAU,—Plaintiff

versus

JOUANIS & ORS,—Defendants

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Before

His Honor A. G. ELLIS,—Chief Judge

and

His Honor E. J. LECLÉZIO,—First Puisne Judge

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E. PELLEREAU,—Of Counsel for Plaintiff
F. SIMONET,—Attorney for the same.

H. HEWETSON,—Of Counsel for Defendants
W. HEWETSON,—Attorney for the same

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Record No. 19,899

24th October 1879

In this action the plaintiff craves judgment condemning the defendants to pay to him the sum of Rs. 3,788 together with interest thereon for five years at six *per centum per annum*. The sum sought to be recovered is alleged to be the amount of an account for

moneys paid by the late Adolphe Loizeau on behalf of Mr and Mrs D'Argent, which the late Charles Jouanis, by a writing dated 27th November 1848, bound himself to repay. The plaintiff who holds the rights of his brothers and sisters and also those of his mother, sues as heir under benefit of inventory of his late father Adolphe Loizeau, the creditor in the obligation, and the defendants are called as heirs and successors of the late Charles Jouanis, the debtor in the said obligation.

The defendants plead that the cause of action having arisen at Seychelles, the succession of the late Charles Jouanis having opened there, and the majority of the defendants being domiciled there, the action should have been entered before the Court of the District Judge of Seychelles, and it is not cognizable by this Court.

In support of this preliminary plea the defendants maintained that under Ordinance No. 22 of 1853 the District Court of Seychelles is vested with exclusive jurisdiction in all Civil cases brought or instituted against any person residing in the dependency, and that even assuming that the Court has a concurrent jurisdiction, the case should be remitted for trial before the District Court of Seychelles, the action being one which may be more conveniently and less expensively tried before that Court.

This plea of the defendants proceeds upon the assumption that the action is one which might competently have been entered before the District Court of Seychelles. If the suit could not have been instituted before the District Judge the defendant's contention must fail. Let us see whether the action is one which might competently have been brought before the inferior Court.

The jurisdiction of the District Judge of Seychelles is dependent upon Ordinance No. 22 of 1853. By article 2 of that Ordinance, Ordinance 34 of 1852—which fixes the Civil jurisdiction of District Magistrates in the Island of Mauritius—is extended to the Seychelles Islands, "as if the said Islands had "been therein specially named, subject to "the amendments and modifications herein-"after enacted." By article 2 of the Ordinance referred to jurisdiction is conferred on District Magistrates "in all Civil cases (ex-"cept as hereinafter excepted) brought or "instituted against any person residing in the "District for which the said Magistrates "shall be respectively appointed wherein the "sum or matters in dispute, whether in ba-"lance of account or otherwise, shall not ex-"ceed the amount of £ 50. By the extending ordinance the £ 50 limit is declared "not to extend to Seychelles—but jurisdic-"tion is given in all Civil matters..... "whatever may be the amount of the sum or "matter in dispute." There can be no doubt therefore that the large amount claimed here does not render the suit one which it would have been incompetent to bring in the District Court of Seychelles.

But in addition to the limit prescribed to the jurisdiction of District Magistrates in Mauritius, depending on the value of the matter in dispute—there is another important restriction placed on the jurisdiction of District Courts by Article 2 of Ordinance 34 of 1852. District Magistrates are only empowered to entertain cases "against any person residing in the District." In extending the Ordinance to Seychelles, no provision is made affecting this limitation of Jurisdiction. It is clear therefore that the District Judge of Seychelles is only empowered to entertain cases in which the Defendants are resident in the Seychelles Islands.

In this case however, while the majority of the Defendants are resident in Seychelles, one of the Defendants is described in the declaration as "Isaure Jouanis, widow of the late "Amédée Moulinié of Poudrière street, Port "Louis, Proprietress and in the Usher's re-"turn as of Champs de Mars street Port "Louis." So far therefore as this Defendant is concerned, we must take it that she is not resident in Seychelles, and that the action *quoad* her could not competently have been brought before the District Judge. The suit as we have seen is instituted against a number of persons as heirs and representatives of the debtor in the obligation sought to be enforced, and, even assuming that that claim could have been divided, we are clear that the Creditor was not bound to have gone to the expense of instituting two actions, one before the District Court of Seychelles against the main body of the defendants, and another against the defendant Isaure Jouanis before this Court. We think the plaintiff was entitled to sue all the defendants in one action, and that such an action could not have been instituted in Seychelles, all the defendants not being resident there.

But if this action is not one which falls within the Jurisdiction conferred on the District Judge of Seychelles, the defendants' plea cannot be sustained, and the suit is neither one in which the District Judge has exclusive jurisdiction, nor one in which he has jurisdiction concurrently with this Court.

It is unnecessary for us to go further and

examine whether, supposing this action could competently have been instituted in the Court of the District Judge, this Court has or has not an original jurisdiction concurrent with that of the District Judge—holding as we do that the action, as laid, could not have been instituted before the Inferior Court, we must repel the preliminary plea taken by the defendants to the Jurisdiction of this Court, and order the case to be proceeded with on the merits. Costs reserved.

BAIL COURT

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APPEAL FROM JUDGMENT OF DISTRICT JUDGE OF SEYCHELLES. ACTION IN DAMAGES FOR LIBEL. AFFIDAVITS. ARTICLE 1382 OF THE CIVIL CODE.

In this case the plaintiff in the Court below, now respondent, claimed from the defendant (now appellant) the sum of Rs. 10,000 *for damages for prejudice caused to his character and reputation by certain statements contained in two affidavits sworn to by the defendant, which statements the plaintiff alleged were wilfully false and libellous.*

The District Judge, while finding that the defendant was not guilty of bad faith, and that the facts sworn to by him were not false, still was of opinion that by the fact of emitting the affidavits and therein giving an erroneous date, he had caused prejudice to the plaintiff, and accordingly found the defendant liable in damages to the extent of Rs. 200 *with costs. This latter appealed.*

Held by the Court, that the statements contained in the affidavits were neither false nor libellous, and that there was no evidence to show that the insertion of an erroneous date in one of the affidavits sworn to by the defendant had caused prejudice to the plaintiff.

That the mere fact of throwing into the form of an affidavit statements true in themselves and otherwise unobjectionable, will not render the deponent guilty of a "faute" in the sense of article 1382 *of the Civil Code, and give rise to a claim of damages which would not otherwise have existed.*

The Court therefore quashed the judgment appealed from, dismissed the action and found the appellant entitled to his costs both in the Court below and on appeal.

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BROOKS,—Appellant

versus

COLLARD,—Respondent

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Before

His Honor A. G. ELLIS,—Chief Judge

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R. M. BROWN,—Of Counsel for Appellant
T. HERCHENRODER,—Attorney for the same

E. PELLEREAU, A. THIBAUD, } Of Counsel for Respondent
P. F. LASTELLE.—Attorney for the same

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Record No. 718

24th October 1879

This is an appeal against the judgment pronounced in an action instituted in the District Court of Seychelles. In that action, Edouard Collard, Inspector of Licenses, Seychelles, sought to recover from Dr Brooks, Medical Officer there, damages for prejudice alleged to have been caused to his character and reputation by two affidavits sworn before the District Judge by the defendant, and by him handed over to George Barrow, collector of Dues and Taxes, at Seychelles.

The first of the two affidavits set forth that about noon on *9th May* 1878, the deponent was present at the District Court, Mahé, when the case of the *Collector of Dues and Taxes* v. *Carosin* was heard, and saw Edouard Collard in the verandah of the Court house; that the next case also at the instance of the Collector, against a person whose name he does not remember, was struck out, as he understood in consequence of the plaintiff's absence from Court; that soon after the Collector returned to the District Court house, and immediately left the Court with him (deponent), and walked towards the Custom House; that, on the way, they met Collard going towards the Court, and the Collector reprimanded him for having left the Court and said the case had been struck out in consequence of his (Collard's) absence.

This affidavit is dated 23rd October 1878, and was emitted by Dr. Brooks at the request of Mr Barrow. From the evidence adduced

in the Court below, it appears that being unable to recollect the exact date of the occurrences to which he was asked to swear, and not knowing the name of the case in connection with the stricking out of which they occurred, but knowing it was the case immediately after that of *Carosin*, Dr Brooks asked the District clerk to ascertain, by reference to the records of the Court, the date when Carosin's case came before the Court, and on being informed that it was the 9th of May, deponed to that date as the date at which the facts set forth in the affidavit occurred. On learning subsequently that the date given by the District clerk was the date when judgment was pronounced in the case of Carosin, whereas the facts deponed to had taken place at the hearing of the case about a fortnight before, Dr Brooks at once hastened to rectify the error into which he had been led by emitting the second affidavit founded on in this action. This affidavit dated 13th November 1878 sets forth that the date mentioned in the previous affidavit as that on which the facts sworn to had occurred was erroneous, the facts mentioned having happened on the *23rd of April* and not on the *9th May*; and that the mistake had arisen from the deponent having mistaken the date of the deferred judgment in the case of Carosin for the date when that case was heard.

These affidavits were handed over to Mr Barrow. The District Judge has found that Dr Brooks was ignorant of the use to which they were to be put; but the evidence shows that, as matter of fact, they were transmitted by Mr Barrow to His Excellency the Governor with the view of supporting explanations given by him for reply to a report made by Collard against him for negligence in connection with the prosecution of the case struck out, vizt: *Collector of Dues and Taxes* v. *Jacques Siméon*. In communicating this charge to Mr Barrow, the Chief Civil Commissioner writes: " Mr Collard reports the " case (*Collector of Dues and Taxes* v. *Jac-* " *ques Siméon*) was dismissed because you " did not inform him of the day of hearing or " call any witnesses, or ask for any postpone- " ment in order to summon the witnesses " for the prosecution, and requests Mr Bar- " row to give in detail your..... reasons " for not calling witnesses, and properly pro- " secuting the case against *J. Siméon*."

The plaintiff in the Court below alleged that the statements contained in the affidavits sworn by the defendant were wilfully false; that by their means Mr. Barrow had been able to throw discredit upon allegations made by him, that in consequence his character and reputation had been injured, and he claimed Rs 10,000 as demages for the prejudice so caused to him.

The learned District Judge held that Dr Brooks had not been guilty of bad faith, but had conscientiously believed the facts set out in the affidavits sworn by him; that with the exception of the erroneous date—mentioned in the affidavit of 23 October, the facts deponed to had not been shown to be false, but that having emitted an affidavit certifying that facts occurred on the 9th May 1878 which did not take place on that day, the defendant was responsible for any damage sustained by the plaintiff, and that tho' no specific damages had been proved, general damages may be claimed. As he (the District Judge) was of opinion that the plaintiff had suffered some prejudice thro' the acts and deeds of the defendant, he accordingly found him liable in damages to the extent of Rs 200, and costs.

Against this judgment dated 29th March last, the defendant appealed. As is usual in appeals from the District Court of Seychelles, the reasons of appeal are numerous and argumentative. In supporting the appeal only three or four of the grounds of appeal were touched on. After careful consideration I am of opinion that the appeal should be sustained and the judgment complained of set aside.

A perusal of the affidavits upon which the claim for damages is based (especially when coupled with the finding of the learned District Judge that the appellant was ignorant of the use to which they were to be put) satisfies me that the statements contained in them are not defamatory or libellous and do not *per se* constitute a " faute " in the sense of Art. 1382 of the Civil Code. In order, therefore, to make good a claim for damage resulting from these affidavits, it must be shown either that the act of taking an affidavit to the facts set forth was a wrongful act, or that the appellant was guilty of imprudence and rashness in swearing to facts which were not correct, and that from their incorrectness, prejudice has been occasioned to the respondent. It would appear that the District Judge regarded the affidavits as containing libellous matter, and that he further regarded the fact of the statements having been made in the form of an affidavit as constituting " faute " on the part of the respondent. In neither of these views, however, am I able to concur. I do not think that the statements in the affidavits contain any libel on the respondent, and I cannot admit that the mere fact of throwing into the form of an affidavit statements true in themselves and otherwise unobjectionable, will render the deponent guilty of *faute* and

give rise to a claim of damages which would not otherwise have existed.

If any claim for redress exists on the part of the respondent, it must depend upon the fact that the statements contained in the affidavits are untrue. If they are false, the appellant in deponing to them (even in the *bonâ fide* belief that they were true) may have been guilty of rashness and imprudence, entitling the respondent to redress for prejudice arising from the inaccuracy of the statements to which he has sworn.

In order therefore to entitle the respondent here to damages he must show, first, that the affidavits contain false statements and further that these false statements have caused him prejudice. As to the first point, apart from the admittedly mistaken date in the first affidavit, the District Judge,—who erroneously deemed that the *onus* of proving the statements to be true rested on the appellant — says that the evidence brought forward by (the appellant) "has been so strong "that, if I could believe that no error was "possible, I should say that he has proved "this part of his case, but, having in view "the fact that error is possible and that the "affirmation of the issue *lies* upon him, I "must decline giving a positive opinion on "this point." In presence of this most guarded statement, and holding that the burden of proof lay with the respondent, I have no hesitation in holding that, with the exception of the date mentioned in the first affidavit, he has utterly failed to establish the falsity of any of the facts deponed to.

The date assigned to the occurrence narrated in the first affidavit is however incorrect, and I am willing to assume that for any prejudice caused by this unwitting inaccuracy the appellant is liable. But has this error occasioned any prejudice to the respondent? Of this I fail to see the slightest evidence. On the contrary I am satisfied that had the words "23rd day of April" occurred in the first affidavit in place of the words "9th day of May", the position of the respondent would have been exactly what it is now. The suggested causes of prejudice are 1st the withdrawal of the respondent's securities—but there is ample evidence that this arose from circumstances totally independent of the date ascribed to the occurrences. The other cause of prejudice is that in the eyes of his superiors in the service, the affidavits would shake the character and reputation of the respondent for truthfulness—by leading them to believe that he was in Court immediately before the case of the *Collector* v. *Jacques Siméon* came on, and consequently that his allegation that that case had been dismissed owing to Mr Barrow having failed to inform him of the day of trial, was untrue. So far as relate to what occurred on the day of trial of that case, as we have said the facts must be assumed to be true, and therefore the affidavit gave no claim for redress. But could the inaccuracy of representing that these occurrences took place upon the 9th May and not on the 23rd April in any way affect the respondent's credit with his superiors? I am clear it did not. Either they were not aware of the date when the case was dismissed or they were aware. If they did not know (as would appear to have been the case,) the belief resulting from the affidavit that the facts occurred on the 9th of May could not affect the respondent; what may have affected the truth of his charge against the Collector of Dues and Taxes, was the fact that on the day of trial, whenever that was, he had been in Court immediately before and left as the case was called on—a statement which we must assume to be true. The *date* of the occurrence was immaterial. On the other hand if his superior officers knew that the case referred to by the respondent in his report against Mr Barrow came on for hearing on the 23rd of April, the affidavit, referring as it did to a different date, could not discredit his allegation.

I am therefore of opinion that the judgment appealed from is unsound as there is not a tittle of evidence to show that the insertion of an erroneous date in the first affidavit occasioned prejudice to the respondent.

I shall accordingly quash the judgment appealed from, and dismiss the action finding the appellant entitled to costs both here and in the Court below.

BAIL COURT

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APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE.—TENANT.—NOTICE TO QUIT. —PLEA OF FORCE MAJEURE.—LANDLORD. —HIS RIGHT TO RAISE RENT.

Circumstances under which the Court held that a tenant who has received a notice to quit, must show that he has tried in fact all in his power to remove to some other place, before he can set up as a defence acts of the executive which may inconvenience him to a great extent, but which are not by themselves an absolute impediment to his finding another suitable place to remove to.

Held that a landlord has the right to raise the rent of his premises, but that such right can always be limited to a reasonable extent by Courts of Justice.

The Court, therefore, being of opinion that the evidence laid before the District Magistrate was not complete enough to warrant the plea of "force majeure" invoked by the appellant, sustained the judgment appealed from, but found however that the amount due for rent and awarded by the Magistrate was excessive and reduced it accordingly from Rs 150 to Rs 68.75.

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MARTIN,—Appellant

versus

HATCH,—Respondent

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Before

His Honor Mr Justice LÉCLEZIO,—First Puisne Judge

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L. A. THIBAUD,—Of Counsel for Appellant
G. KŒNIG,—Attorney for the same

Y. JOLLIVET,—Of Counsel for Respondent
E. MARGEOT,—Attorney for the same

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Record No. 721

31*st October* 1879

The appellant had a certain number of bullocks sent to the respondent's pasture land in the district of Pamplemousses about the end of March last, and it was agreed that the bullocks would remain on respondent's land for two months and that the price to be paid per month would be Rs 45—for about 55 bullocks. It appears from the evidence that it was also agreed between parties that the land upon which the bullocks of appellant were to graze, was limited by certain boundaries specified by respondent who reserved the remainder of his land—difficulties having arisen between parties as to the insufficiency of grass within the limits assigned to appellant's bullocks, appellant gave notice before the expiry of the two months aforesaid that he would remove his bullocks from respondent's land, and he declares he was on the point of so doing when the cattle disease, still now raging, having broken out, the General Board of Health published Regulations on the 21st May which obliged him, though reluctantly, to leave his bullocks on the respondent's land.

On the 19th of June last the respondent caused a notice to be served on appellant by which he warned him that if on the 24th of the same month he had not removed his cattle from respondent's lands, the monthly price of the pasture land occupied by them would be raised from 45 to 200 rupees.

An action was subsequently entered before the District Court of Pamplemousses by respondent to obtain the ejectment of appellant's cattle from his land, and the payment of 200 rupees for one month's enjoyment of his pasture ground in conformity with the aforementioned notice.

The District Magistrate after having heard evidence, ordered the appellant to remove his cattle within 48 hours, and to pay 150 Rs. for one month's enjoyment of respondent's land.

I have before me, documentary evidence shewing that on the 30th May, appellant applied to the General Board of Health in order to send his cattle to a plot of ground belonging to him in the same District, and that the authority was refused. There is also in the record a letter dated the 26th August by which the President of the General Board of Health declined to move his herd to Mr Hewetson's land, but informs him that if he desired to do so, he might petition the Board to that effect. The learned Magistrate says the appellant did not show that he had applied to the Board of Health to drive his cattle to a neighbour's land and that Hewetson's cattle had been infected by the epizooty. It may be that it was because Hewetson's cattle had been infected that the President of the General Board of Health refused appellant's request, altho' it does not appear from the President's letter what was the reason of the refusal. Was the appellant bound to show that he had applied to all the neighbours, and that no one had consented to remove his bullocks? It was argued for the appellant that the Regulations of the 21st May are very stringent and that this is a case of *force majeure* resulting from them. Besides that the two attempts made by appellant to obtain permission of removal being unsuccessful, the presumption must be that further applications on his part would have met with the same refusal, and the appellant had

sufficiently shewn his willingness to send his bullocks elsewhere.

The appellant invoking a case of force majeure, it was for him to prove that it was utterly impossible for him to move his cattle to some other contiguous ground; this he does not appear to have done. It is not sufficient to say that there is a decree preventing the passage of cattle on public roads, and allowing neighbours to kill bullocks trespassing on their ground, the tenant who has received a notice to quit must show that he has in fact tried all in his power to remove to some other place, before he can set up as a defence acts of the Executive which may inconvenience him to a great extent, but which are not by themselves an absolute impediment to his finding other suitable grounds in conformity with the requirements of the new Regulations. I am not satisfied that the evidence laid by the appellant before the District Court was complete enough to warrant the plea of *force majeure* in this case, and I must accordingly sustain the judgment of the District Magistrate in so far as it orders the appellant to remove his cattle from the respondent's premises within 48 hours.

The respondent having given notice that the price of his pasture land was raised to Rs. 200, the Magistrate reduced that amount by Rs. 50 and condemned the appellant to pay Rs. 150 for one month. I cannot help finding this sum exaggerated, it is more than three times the amount agreed upon between parties for the two first months—it was said that a landlord had the right to increase the rent as he chose in order to get rid of a troublesome tenant, and it was stated that the appellant's bullocks had trespassed several times on respondent's reserved portion of land, and that if infected by the epizooty, they might become a danger to the herd of goats belonging to the respondent. I think that the right of the landlord to raise the rent of his premises cannot be doubted, but Courts of Justice have always limited such right to a reasonable extent. It was stated at the Bar that the usual price for the pasture was R. 1 per head and per month; I consider that under the circumstances the sum of R. 1.25 per head and per month is a sufficient renumeration for the proprietor of the pasture land from the day he mentioned in his notice of the 19th June, that is to say from the 24th June; and I do accordingly hereby reduce the amount in the judgment appealed from to the sum of Rs. 68.75.

Subject to this reduction the appeal is dismissed, appellant to pay to respondent the two thirds of his costs both in this Court and in the Court below.

SUPREME COURT

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ACTION IN DAMAGES FOR BREACH OF CONTRACT.—INTERPRETATION OF THE SAME.—NO MENTION OF DURATION OF AGREEMENT.—NOTICE BY ONE OF THE PARTIES SUFFICIENT TO RENOUNCE THE STIPULATED CONDITIONS.

Held that in the agreement entered into between the parties in this case, there was nothing which could bring it within the principle of those cases in which restrictions of trade had been held to be against public policy.

That no period having been fixed for the duration of the contract; it amounted to an undertaking by each of the parties to carry on his trade in the manner specified so long as the other party did the same, and no third competitor set up business in the districts named.

That either party could get rid of the obligation by giving a reasonable notice to the other of his intention no longer to be bound by it, and that, therefore, the notice given by the defendant of his intention to renounce the stipulated conditions was sufficiently specified and distinct.

The Court therefore found for the defendant with costs.

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BAISSAC,—Plaintiff

versus

LAZARE,—Defendant

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Before

His Honor L. Cox,—Acting Second Puisne Judge

and

His Honor E. M. WOOD,—Acting Third Puisne Judge

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E. Pellereau.—Of Counsel for Plaintiff
E. Halais,—Attorney for the same

W. Newton,—Of Counsel for Defendant
L. Desperles,—Attorney for the same

Record No. 19,814

7th November 1879

In this case an agreement in writing was entered into between the plaintiff and defendant who are both manufacturers of mineral waters whereby the parties bound themselves each to confine his trade to a particular district, and to sell only according to a tariff of prices set out in the agreement. The contract is silent as to its intended duration except that there is a proviso that it shall become null on the arrival of a third mineral water seller in either of the districts mentioned.

The date of this document is June 11th 1877 and on the 29th December of the same year the defendant wrote to the plaintiff that he was unable longer to continue the conditions agreed on and that he renounced them from January then next. At the same time he suggested a modification of the agreement. The plaintiff replied by telegram to the effect that he held the defendant to his bargain but notwithstanding this, the defendant during the ensuing year sold his waters in contravention of the terms of the agreement.

The plaintiff alleges that he has sustained losses in his trade owing to the breach by the defendant of the agreement between them and he claims damages. The defendant's case is that the agreement was originally null as being against public policy and that on the true construction of it, it was open to either party to rescind it by notice, and that this was duly done by the letter of December 29th 1877.

With regard to the first point we need only say that in this agreement as we understand it, we see nothing that brings it within the principle of those cases in which restrictions of trade have been held to be against public order. If however we were to put upon the contract the coustruction which the plaintiff alleges it should bear, we might be compelled to come to a different conclusion. The plaintiff contends that this contract is terminable only by the arrival of a third soda water seller or by mutual consent. If this were so, one of the parties to the contract, and perhaps his heirs after him might be compelled by the other either to carry on his trade within the particular district for an indefinite time at a ruinous loss or to abandon it altogether. We should hesitate before we come to the conclusion that an agreement such as this, was consistent with public policy, but we do not think that this is the proper construction to be put on the agreement before us. No period having been fixed for the duration of the contract we think that it amounted to an undertaking by each of the parties to carry on his trade in the manner specified so long as the other party did the same and no third competitor set up business in the districts named, and we think that either party could get rid of the obligation by giving a reasonable notice to the other of his intention, no longer to be bound by it. We are further of opinion that the notice given by the defendant of his intention to renounce the stipulated conditions was sufficiently specified and distinct, and we therefore give judgment for the defendant with costs.

SUPREME COURT

Motion for distraction of costs.—Interval between judgment given and motion.—Compensation.—Article 133 of Code of Civil Procedure.

In this case the plaintiff's attorney moved for distraction of costs in his favour, at the same sitting as that at which judgment was given, but after an interval of an hour, and after one of the judges before whom the case had been heard, had left the Bench.

The defendant objected to the motion as incompetent on the ground that it had not been made at the moment when the judgment in the case was pronounced, and because compensation had operated between that debt and a similar amount due by the plaintiff to him, and that after any sensible interval of time it was incompetent for the Court to transfer to the attorney of the plaintiff a debt which had been extinguished.

The Court, in the circumstances of this case, having regard to the short interval which elapsed between the pronouncing of the judgment, and the making of the motion, and to the fact that such motion was made at the sitting when judgment was given, was of opinion that the motion was competent and made in time, and that compensation had not taken place between the parties.

The Court, therefore, granted the motion prayed for.

TOUSSAINT,—Plaintiff

versus

BRÉARD & WIFE,—Defendants

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Before

His Honor A. G. ELLIS,—Chief Judge

and

His Honor E. M. WOOD,—Acting Third Puisne Judge

—

E. PELLEREAU,—Of Counsel for Plaintiff
A. ROLANDO,—Attorney for the same

L. ROUILLARD,—Of Counsel for Defendants
P. E. DE CHAZAL,—Attorney for the same

—

7th November 1879

The attorney of the successful party in this suit moves for distraction in his favour of the costs found due. The motion is objected to by his opponent as incompetent on the ground that it had not been made at the moment when judgment in the case was pronounced. The facts are these: the application for distraction of costs was made at the same sitting as that at which judgment was given but after an interval of about an hour, and after one of the judges before whom the case had been heard, had left the Bench. On the motion being made the Court ordered that the application should be recorded, but abstained from then dealing with it, leaving it to be disposed of when the judges who had had cognizance of the cause should again meet on the Bench. The motion is now renewed, and we are clear that it must now be dealt with as if made at the sitting when judgment had been pronounced in the cause, but after an interval of an hour.

The weight to be allowed to the objection now taken must depend on the construction to be put on article 133 of the Code of Civil Procedure which provides that attorneys may demand distraction of costs "en affirmant "lors de la prononciation du jugement qu'ils "ont fait la plus grande partie des avances" and further "la distraction des dépens ne "pourra être prononcée que par le jugement "qui en portera la condamnation."

The objector argued that costs having been found due to his opponent personally, and no modification in that finding having been made *at the moment* of judgment itself, compensation had operated between that debt and a similar amount of a debt due by his opponent to him, and that after any sensible interval of time it was incompetent for the Court to transfer to the attorney of his opponent a debt which had been extinguished.

This precise point does not seem to have arisen before the Courts in France, but it has repeatedly been held that if the motion be made when judgment is pronounced, the affirmation may be made at some subsequent period. This decision is most important as showing the way in which the article is to be construed. The article requires that the affirmation should be made "lors de la pro-"nonciation du jugement" and if this formality may take place after an interval, and at another sitting of the Court, it follows that the order of distraction need not under pain of nullity be made at the very moment of judgment, but when made will date back to the judgment. We think that the principle of these decisions is a sound one, and that the argument as to compensation having taken place goes too far, as if pressed to its legitimate result no distraction of costs could be ordered in such circumstances as the present, unless it had been moved for prior to judgment; for even if the motion for distraction were made immediately after judgment, and followed at once by the affirmation, compensation would have taken place in the interval between the judgment and the order of distraction. Were we to hold that the short interval which elapsed here rendered the application incompetent, we should, we think, be imposing too narrow a construction on the terms used, and creating a nullity not enacted by the law itself. Had the position of matters been changed, and had any alteration in the relation of parties supervened between judgment and the moment when the motion for distraction was made, we are far from saying that that would not have raised an objection fatal to the motion. But confining ourselves to the circumstances of this case, having regard to the brief interval which elapsed between the pronouncing of the judgment and the making of the motion, and to the fact that the motion was made at the sitting when judgment was given, we think that the objection is based on a strained interpretation of the law, and cannot be sustained.

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BAIL COURT

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APPEAL FROM JUDGMENT OF DISTRICT JUDGE OF SEYCHELLES.—ACTION IN DAMAGES FOR ILLEGAL SEIZURE OF A SHIP UNDER ORDINANCE 8 OF 1854.—PROBABLE CAUSE.—ARTICLES 75, 76 & 91 OF ORDINANCE 8 OF 1854.

In this case the Respondent, as Collector of Customs of Seychelles, ordered the seizure of the brig "Alert" belonging to the appellant, for diverse false declarations by her Captain, and for the harbouring of a certain quantity of timber and copper not declared at the Custom House.

The appellant, before the Court below, claimed $ 4000 damages from the respondent for the illegal seizure of his vessel, and asked for the nullity of the seizure.

The District Judge found that under the circumstances of the case, there was probable cause for the seizure of the "Alert", and under Article 91 of Ordinance 8 of 1854 awarded two pence damages to the plaintiff. This latter appealed.

Held by the Court that according to Articles 75 & 76 of Ordinance 8 of 1854, it is not sufficient that goods be liable to forfeiture to render the vessel which contains or has contained them liable to seizure, such vessel must have been made use of in the removal of the goods.

That, in this case, the acts with which the Captain of the "Alert" was charged, as well as the motives mentioned in the order of seizure signed by the respondent, could not, under Ordinance 8 of 1854, entitle the respondent to seize the vessel, as there was nothing to show that the "Alert" had been made use of in the sense of Article 75 of Ordinance 8 of 1854, so as to render her liable to seizure.

That there was no article in our law which rendered a ship liable to forfeiture because part of the cargo has been thrown overboard to avoid detection; that, therefore, the seizure made by the order and authority of the respondent was an illegal act.

That as the law was clear and did not authorize the seizure of the "Alert" for acts which the respondent considered her Captain to be guilty of, there was no probable cause for the seizure; and consequently that the respondent was not protected by Article 91 of Ordinance 8 of 1854 and was liable in more than two pence damages towards the appellant, owner of the "Alert".

The Court accordingly quashed the judgment appealed from, and remitted the case back to the District Judge in order that he should assess the damages according to the evidence already adduced before him.

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ALBERT,—Appellant

versus

SALMON,—Respondent

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Before

His Honor E. J. LECLÉZIO,—First Puisne Judge

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R. M. BROWN,—Of Counsel for Appellant
F. MALLET,—Attorney for the same

E. GALLET,—Of Counsel for Respondent
J. BOUCHET,—Attorney for the same

—

Record No. 710

7th November 1879

The appellant in this case is the owner of the British brig "Alert." He complained before the District Court of Seychelles that his ship had been illegally seized by orders of the respondent acting in his capacity of Chief Civil Commissioner and Collector of Customs for the Seychelles Islands, and asked for the nullity of the seizure and damages up to the sum of $ 4,000.

The plaint signed by the District clerk is dated the twenty first day of June 1878 and appears to have been served upon the defendant, now respondent, on the 26th June; on the 22nd June the seizure was withdrawn and on the 1st of July the ship was delivered to the appellant, but the action in damages was proceeded with, and on the 14th of February last the District Judge gave judgment as follows:

"The facts of the case of seizure are plain "and serious. Captain Louis Albert of the "brig "Alert" went to Cosmoledo Island to

" fetch a certain quantity of copper saved by " captain Muratorio ; the copper was taken " from Cosmoledo Island on board the brig " " Alert " and when in the harbour of Port " Victoria, he, captain Albert, hides a certain " amount of the copper in the hold of the " Alert, with a view of appropriating the " same, and without any payment of Custom " duties ; the Custom officer heard of it, " went on board, and before his arrival the " copper was thrown overboard ; divers were " employed and copper bolts found in the " sea at the very spot where the Alert was " anchored, in consequence the Alert was " seized. Under these circumstances it would " be giving a premium to swindling if I " award any damages against the defendant. " I am of opinion that there was probable " cause of seizure and action, and in virtue " of art. 91 of Ord. No. 8 of 1854 I order " that plaintiff do recover two pence damages " without costs.

The authority given by the Collector of Customs to seize runs thus : " To H. Tre- " garthen Esqre. Tide Surveyor. I hereby au- " thorize you to seize the brig " Alert "as she " now stands in the harbour of Port Victoria " for diverse false declarations by the master " and for harbouring of a certain quantity of " copper and timber not declared at the Cust- " om House. Dated at Port Victoria, Mahé, " this 10th day of April 1878. Signed C. S. " Salmon Cf. Cl. Commissioner.

The seizure was made on the 20th of April and in the memorandum of notification thereof which was drawn up and posted upon the main mast in presence of the master of the " Alert," it is stated that the seizure was made for breach by the said vessel of Ord. No. 8 of 1854.

There were six charges brought against the master of the Alert by the Chief officer of Police of Seychelles : the first one for " having on the 7th of April 1878, wilfully, " and maliciously removed on board the said " brig " Alert " a certain quantity of copper " bolts shipped at Cosmoledo Island upon " which the Custom duties have not been paid " and the formalities required by Law and " the Custom Regulations have not been ful- " filled, the whole contrary to Law and with " intent to defraud her Majesty's Revenue."

When the case came for hearing on the 8th day of May an amendment to the plaint was prayed for by substituting the word *seventeenth* to *seventh* as this last word was a clerical error. The amendment was granted. Another amendment was then moved for, namely, that after the words : *Cosmoledo Islands*, the following words be added : " and unshipped " the same, whilst in the harbour of Port " Victoria, by ordering them (the copper " bolts) to be thrown overboard." This amendment was objected to and refused ; and the plaint was withdrawn.

The second charge was for having " on the 16th of April wilfully, maliciously and unlawfully made an untrue declaration, and not having truly answered certain questions put by an officer of the Customs whilst in the lawful performance of his duty, with regard to the landing of the cargo. The accused was found guilty and ordered to pay a fine of Rs. 1,000.

The third charge was for having " on the " 17th of April wilfully, maliciously and un- " lawfully harboured on board the said brig " " Alert " a certain quantity of copper bolts " and sky lights and about ten pieces of timber " shipped in the Island of Cosmoledo or " elsewhere upon which the Custom Regul- " ations have not been fulfilled." The charge " was dismissed because the Judge was of opinion " that there could not be any harb- " ouring where there was no removal, that " the copper came on board the Alert from " Cosmoledo and was found there." These three charges were brought upon informations sworn on the 20th April, date of the seizure.

The fourth charge was brought upon information sworn on the 1st of May for having on the " 17th of April wilfully and unlawfully obstructed a Police constable when acting in the aid of an officer of Customs when searching the brig " Alert " for goods liable to seizure ; the case was dismissed.

The fifth charge was also brought upon information sworn on the 1st of May for having on the 12th of April wilfully and unlawfully made an untrue report in writing at the Customs to the Collector of Dues and Taxes ; the accused was fined Rs. 500.

The sixth and last charge was brought upon information sworn on the 8th of May for " having on the 17th of April wilfully, " maliciously and unlawfully removed from " the brig "Alert "a certain quantity of copper " bolts shipped at Cosmoledo the same not " being legally declared and liable to forfeit- " ure as Ord. 8 of 1854 provides, by having " them thrown overboard through his sailors " upon which copper bolts the Custom duties " have not been paid and the formalities re- " quired by Law and the Customs Regula- " tions had not been fulfilled."

The District Judge after having heard the case, gave judgment as follows : " I have

" carefully examined Ord. No. 8 of 1854 and " also carefully compared it with the Custom " Act of 1853 V. 16 and 17, from which the " said Ordinance was inspired, and I am of " opinion that clause 75 of Ord. No. 8 of " 1854 cannot be applied in the case. The " facts proved do not amount to the removal " required by that article. It has been proved " that a certain quantity of copper not de- " clared remained on board the "Alert," and " that when defendant heard there was a " search to be made on board the ship, know- " ing that the copper was liable to seizure as " not having been declared, he ordered them " to be thrown overboard to avoid being " detected ; in consequence the removal took " place not from another ship into the "Alert," " but took place from the "Alert" into the sea, " merely to avoid detection, and the defend- " ant well knowing that he had no hope " whatever to recover his copper hereafter. " And clause 75 is most positive, there must " be removal from the ship where the goods " were to another vessel, boat etc, with the " intention of landing the same, and in this " case nothing of the like took place; there is " a clause in the Act 16 and 17 Victoria 1853 " (Cap. 107) Section 216 by which a vessel " is seized, and the master fined when throw- " ing goods overboard, but this clause was " omitted when our Act was framed, and in " consequence I am of opinion that this case " is not proved."

After dismissing the charge in that case the Judge added: " Whilst pleading, plaintiff " in terms of clause 91 asked, in case of dis- " missal, to have the opinion of the Court as " to whether there was probable cause of " action and seizure in the case; that clause is " rather ambiguous as to what is the moment " to make such a motion ; however I have " no hesitation to declare that seeing the cir- " cumstances of this case, there is in my " opinion probable cause of action and seizure"

All the judgments on the five last charges were given on the 21st June, the very day on which the action in damages was entered for illegal seizure as I said before.

Such being the facts resulting from the proceedings before the Court of Seychelles, the question to be decided is whether the Judge rightly interpreted Ord. No. 8 of 1854 when he declared that there was probable cause of seizure and refused to allow more than two pence damages with costs.

The articles of Ordinance No. 8 of 1854 which speak " of forfeiture and seizure of " ships are articles 75 and 76 : art 75 says : " All vessels, boats, carriages and cattle *made* " *use of* in the *removal* of any goods liable to " forfeiture under this ordinance, shall be " forfeited." And art. 76 says : " all goods " and all ships, vessels and boats, and all " carriages and all cattle liable to forfeiture " under this ordinance, shall be seized etc." If we turn to articles 10 and following, we see what are the goods liable to be forfeited and among them goods *not reported* are liable to forfeiture. But it is not sufficient that the goods be liable to forfeiture to render the vessel which contains or has contained them liable to seizure, such vessel must according to the terms of the ordinance have been *made use in the removal* of the goods. Now can it be said that the "Alert," on board of which copper bolts had been shipped at Cosmoledo, and from which part of the bolts were afterwards thrown into the sea while at anchor in the port of Mahé by the master in order to avoid detection because he has not declared the said copper, *was made use of* in the removal of that copper ? the grammatical sense of the phrase does not appear to me to bear such a construction. The learned counsel for the respondent called my attention to the wording of the authority to seize which has been transcribed herein above, and said that it was clear that the Collector of Customs thought he could order the seizure for the *harbouring* of a certain quantity of copper and timber not declared at the Custom House, and the learned counsel admitted that under art. 75 of Ord. No. 8 of 1854 the word *harbouring* applied to persons and not to ships, but he argued that altho' it might be said that his client did misconstruct the Law, as he committed a bonâ fide mistake in law he was entitled to the same protection as if the mistake was one in fact, the probable cause mentioned by art. 91 of the Ordinance applying as well when there is a mistake in Law as when there is mistake in fact. There can be no doubt that the acts with which the captain was charged as above recited, as well as the motives mentioned in the order of seizure could not under our Law entitle the Chief Civil Commissioner of Seychelles acting as Collector of Customs to seize the vessel; there is nothing in the record to show that the vessel was *made use of* in the sense of article 75 of Ord. No. 8 of 1854 so as to render her liable to seizure and there is no clause in our Law similar to Section 216 of 16 and 17 Victoria Cap. 107 which renders a ship liable to forfeiture because part of the lading was thrown overboard ; the District Judge himself declares it to be so in one of his judgments above quoted, I must therefore come to the conclusion that the seizure made on the 20th of April by order and upon the authority of the Chief Civil Commissioner was an illegal act. Now, if he had no right

to seize in Law, can it be contended that there was probable cause of seizure? It was stated that the respondent believed at the time of seizure that the master of the "Alert" was guilty of the acts he was charged with, and that he also believed that those acts rendered the ship liable to seizure; but must not such belief have resulted from a reasonable interpretation of the Law in order to protect the officer who ordered the seizure? If the Law had been so vague as to give rise to different interpretations, its misconstruction, based upon the bonâ fide belief that the acts charged amounted to an offence rendering, in the opinion of the Custom officer, the ship liable to seizure, might have authorized the plea of probable cause; but, when the Law is clear and cannot possibly be construed otherwise than the District Judge himself has construed it, and the respondent's counsel not having suggested to the Court any other construction, I do not think that probable cause can be invoked by the officer who has evidently gone beyond the limits permitted by the Law? If such an interpretation of the words "probable" cause were to be affirmed, heavy losses might often be sustained without any possibility of obtaining compensation, the party who has suffered for an illegal act would always be met with the answer that the mistake being one in Law there is no remedy, because there was probable cause —one of the features of the proceedings in the Court below is that altho' the seizure was made on the 20th April and prosecutions were entered against the captain, the validity of the seizure was never applied for against the owner of the vessel, and the District Judge however gave in the postscript herein above recited to his judgment of the 21st June, an opinion upon a seizure which was not in issue before him then. It was only after this opinion, that the respondent determined to withdraw the seizure, but he would certainly have done better if he had consulted his legal adviser before he ordered the seizure, for acts of the Captain for which Ordinance No. 8 of 1854 does not authorize the forfeiture and seizure of a vessel. I cannot adopt the theory of the learned counsel for the respondent in this case, and I am of opinion that as the law is clear and did not authorize the seizure of the brig "Alert" for the acts which the respondent considered her captain to be guilty of, there was no probable cause for the seizure, and the respondent is not protected by art. 91 of Ord. No. 8 of 1854, and is liable in more than two pence damages towards the appellant, owner of the said vessel. I must therefore quash the decision of the District Judge of Seychelles and remit the case back to him to assess the damages to which the appellant may be entitled according to the evidence already taken. Costs both in this Court and in the Court below to be borne by the respondent.

SUPREME COURT

—

JUDGMENT BY DEFAULT UNDER ORDINANCE 30 OF 1855.—WRIT OF REVIVOR.—ARTICLE 156 OF CODE OF CIVIL PROCEDURE.—RULE OF COURT No. 77.

Held that as there was no evidence, in this case, to show that the defendants had applied for leave to appear and defend to the writ of summons issued against them in virtue of Ordinance No. 30 of 1855, the default taken against them was one for "faute de comparaitre," i.e. for an ordinary non appearance.

That a writ of Revivor could not be made applicable to a judgment of the Supreme Court given by default and not executed within the delay prescribed by law.

That though Article 156 of the Code of Civil Procedure had been modified by Rule of Court No. 77, still the principle that judgments by default must be executed within six months, had not been interfered with and must be applied.

That therefore judgments by default under Ordinance No. 30 of 1855 must be executed within six months to avoid peremption.

And lastly, that the judgment obtained by plaintiff against the defendants not having been executed by levy or otherwise within the time prescribed by law, had no longer any legal effect.

The Court accordingly dismissed the plaintiff's action with costs.

—

CÉSAR,—Plaintiff

versus

KŒNIG & OR,—Defendants

—

Before

His Honor E. J. LECLÉZIO,—First Puisne Judge

and

His Honor E. M. Wood,—Acting Third Puisne Judge

—

E. Pellereau,—Of Counsel for Plaintiff
E. Leblanc,—Attorney for the same

G. Guibert,—Of Counsel for Defendants
G. Koenig,—Attorney for the same

—

Record No. 20,017

7th November 1879

The plaintiff in this case had on the 10th of August 1865 by a judgment signed in the Registry of the Supreme Court under ordinance 30 of 1855 recovered against the defendants who did not appear to the writ of summons the sum of $ 265.30 c. in principal with interest and costs. It appears that this judgment was never executed by levy or otherwise, and after many years had elapsed the plaintiff applied to a Judge at Chambers on the 29th August 1878 for a writ to revive it; a writ of Revivor was issued and served upon the defendants who filed a notice to say that they appeared to the writ under the express reservation of their right to contest the validity of such writ and to maintain that the proceedings entered by plaintiff are null and void to all intents and purposes and contrary to our law in this Colony.

The plaintiff thereupon entered an action in the form of a declaration reciting the writ of Revivor issued and served upon defendants, and praying that execution be adjuged to him, plaintiff, against the said defendants, of the said judgment, according to the force, form, and effect of the said recovery.

The defendants pleaded several pleas, but the only one we have now to examine is whether the judgment of the 18th of August 1865 continues to have any legal effect or not, it not having been executed within the time prescribed by the laws of this Colony for judgments by default.

It was argued for the plaintiff that the judgment obtained by him under Ord. 30 of 1855 is not of the same nature as the other judgments signed in the Registry of this Court, that under art. 2 of the Ordinance, defendants cannot appear and defend to the writ of summons as a matter of course, but are obliged to apply to a Judge at Chambers, and disclose by affidavits that they have a satisfactory, legal or equitable defence, and to submit to certain conditions before they can be allowed to appear and defend; that besides in virtue of art. 7 of the said ordinance the provisions of the common law Procedure, acts 1852 and 1854 are to extend and apply to all proceedings taken under the ordinance, and that as a consequence judgments signed under the ordinance should be considered as English judgments requiring to be revived when 6 years have elapsed without execution. It was also contended for the plaintiff that Section 77 of the Rules of Court repeating the principles enacted in art. 156 of the Code of Civil Procedure with regard to the execution within six months of judgments by default, do not apply to judgments obtained under Ord. No. 30 of 1855 which is of a posterior date, and besides that article 156 of the Code of Civil Procedure does not exist any longer, as it was made for the *Tribunaux inférieurs* that have been swept away by the new constitution of our judicial system—and it was suggested that if the judgment now sought to be revived is not an English judgment, it has at all events the force of a *jugement contradictoire* under the colonial system.

We have examined the points submitted to our consideration with great care. We believe it is the first time, since the enactment of Ord. 30 of 1855, that the Procedure now before us has been resorted to in order to obtain the revival of a judgment; it has always been considered that we had only two sorts of final judgments in our system, one by default which is to be executed within six months to avoid peremption, and the other "contradictoire" which is good for 30 years and which may be executed at any time before those 30 years have elapsed, without having recourse to the English procedure known as the writ of Revivor; and we must say that all the ingenuity of the learned counsel who argued for the plaintiff, has not succeeded in convincing us that Ord. 30 of 1855 has introduced into our legal procedure a third kind of judgment requiring to be revived, if allowed to remain without execution for more than 6 years.

It appears to us that the sole object of Ord. No. 30 of 1855 is to prevent frivolous or fictitious defences to actions on bills of exchange or promissory notes; it does not provide for the execution of judgments after they have been signed, it does not create a principle different from those existing in our Codes with regard to the force and effect of such judgments; and if no distinction is established by the law itself which regulates the proceedings to arrive at the signing of

the judgment, can we establish one? our attention has been called to art. 7 of the ordinance which speaks of the Common Law Procedure Acts of 1852 and 1854, but that article says that the provisions of those acts shall extend *so far as the same are* or *may be made applicable*, and we fail to see how a writ of Revivor may be made applicable, to a judgment of this Court, unless we begin by introducing into our system this new principle that we have a third category of judgments to be executed viz: judgments under Ordinance 30 of 1855; and we do not find any where that the legislature intended to give a legal effect, different from the one already established here, to judgments obtained under that Ordinance. We do not think that the words of Art. 7 meant to make such a revolution in our procedure concerning the execution of judgments; they must be taken in a restrictive sense, and the rules of the acts therein referred to may be applied when there is no law in Mauritius to the contrary and only then. We believe that this Law, as its title and preamble show, intended simply to put an end to unjust delays and unnecessary expense by preventing fictitious or frivolous defences, but that it had not for its object, once the judgment, obtained to assimilate it to what was called an English judgment during the argument. But can a judgment obtained under Ordinance No. 30 of 1855, always be considered as a "jugement contradictoire" having full effect during 30 years? it was said that a defendant could not appear and defend to a writ of summons issued under that ordinance unless he had previously obtained leave so to do from one of the Judges, and that if he had not chosen to ask for such leave or had not obtained it, he must be presumed to have had no defence at all to propose and to be in the same position as a party who has appeared and failed in his defence.

If it had been shown to us that the defendants had applied for leave to appear and that the Judge had refused such leave, their position might have been assimilated to that of a defendant who after having instructed attorney and counsel and filed a notice of defence or asked time to file a plea, leaves default, and it has been decided (see Piston's Reports 1872, p. 54 case of *Leguen* v. *Buttie*) that this is a "défaut faute de conclure" which places the defendant in the same position as if he had defended himself, and gives to the judgment which follows the force of a "jugement contradictoire"; but there is in evidence that an application was never made by the defendants for leave to appear and in fact it was admitted that no such application was made, so the default which was taken against them must be presumed to have been one *faute de comparaître*, for an ordinary non appearance. It is almost exactly the same position as that of a defendant who files no plea to a declaration served upon him, and who does not appear in Court after a rule *nisi* has been served upon him; the rule is made absolute but that is a judgment by default which according to rule 77 must be executed within six months to avoid peremption, although the Rule *nisi* must be served personally upon the defendant. It was stated that Rule 77 could not apply here because Ordinance No. 30 of 1855 is posterior to it, but admitting this reasoning to be just, the principle contained in that Rule is to be found in Article 156 of the Code of Civil Procedure, and altho' it may be said that this Article has been modified by Rule 77 in so far as the procedure formerly known as *opposition* is concerned, the remainder of the Article which speaks of Execution within six months of judgments by default, has not been interfered with, and we cannot adopt the view taken by the learned counsel for the plaintiff that this Article has been swept away at the same time with the Old Court of first Instance; for the Supreme Court is also a Court of first Instance, and many of the provisions of the Code of Civil Procedure, especially those containing matters of principle, are still applied by this Court, notwithstanding the new judicial constitution of the Colony.

There can be no doubt that the principles contained in our Codes must be applied when they are not specially abrogated, and as we see nothing in our local ordinances or in our rules of Court which does away with the principle: that judgments by default should be executed within six months to avoid peremption, we are of opinion that it extends to judgments by default under Ord. No. 30 of 1855.

Having come to this conclusion we have no alternative but to dismiss this action with costs.

End of Year 1879

SUPREME COURT OF MAURITIUS

His Honor A. G. ELLIS, Chief Judge.
His Honor A. MURE, Acting First Puisne Judge.
His Honor J. ROUILLARD, Acting Second Puisne Judge.
His Honor L. COX, Third Puisne Judge.

The Honorable V. NAZ, C.M.G. Acting Procureur and Advocate General.
E. PELLEREAU, Substitute Procureur General.

VICTOR ESNOUF, Esq., Master.
J. A. ROBERTSON, Substitute Master.

O. D'EMMEREZ DE CHARMOY, Esq. Registrar
L. ISNARD, Assistant Registrar.

VICE-ADMIRALTY COURT

His Honor A. G. ELLIS, Chief Justice, Judge.
The Honorable A. MURE, Judge Surrogate.
The Honorable V. NAZ, Queen's Advocate.
G. A. RITTER, Esq., Registrar.
JAMES BROWN, Marshall.
J. BOUCHET, Queen's Proctor.

COURT OF BANKRUPTCY

JUDGES:—THE JUDGES OF THE SUPREME COURT.
J. HERCHENRODER, Esq., Official Assignee.

COUNSEL (actually practising)

Leclézio, E.	1828	Galéa, H.	1867	Gallet, E.	1871
Bazire, E.	1858	Lemière, H.	1868	Pignéguy, J.	1873
Martin Moncamp, P. G.	1861	Avice, H.	1868	Sauzier, A.	1873
Rouillard, L.	1861	Beaugeard, P.	1868	Jollivet, I.	1874
Chastellier, P. L.	1864	Pilot, G.	1868	Hewetson, H.	1876
Delafaye, V.	1864	Brown, R. M.	1869	Hugues, A.	1877
Guibert, G.	1864	Lionnet, F.	1870	Colin, R.	1878
Newton, W.	1864	Ollier, R.	1870	Delapelin, A.	1880
Lepoigneur, I.	1864	Forget, A	1870	Newton, C.	1880
Jenkins, T. L.	1865	Thibaud, L. A.	1871		
Florent, E.	1865	Desenne, O.	1871		
Bazire, E.	1867	Boucherat, A.	1871		

ATTORNIES (actually practising)

Lalandelle, G.	1842	Simonet, F.	1863	Newton, G.	1873
Hewetson, W.	1846	Pitot, A.	1863	Arnal, C.	1873
Laurent, E.	1846	Bétuel, A.	1863	Vaudagne, E.	1874
Mercier, J.	1848	Boullé, V.	1863	Kœnig, G.	1874
Colin, A. J.	1851	Ritter, G. A.	1864	Bouloux G.	1876
Guibert, J.	1853	Rohan, A.	1864	Thatcher, H.	1876
Finniss, W.	1853	Halais, J.	1865	L'hoste, A.	1877
Bouchet, J.	1853	Sauzier, E.	1866	Giraudeau, G.	1877
Duvivier, Ed.	1853	Commarmond, A.	1867	Leblanc, E.	1877
Desperles, L.	1859	Rousset, C.	1870	Desveaux, A.	1878
Herchenroder, T.	1860	Wohrnitz, L.	1870		
Laval, V.	1860	Rolando, A.	1871		
Chazal, P. E. de	1860	St. Pern, L. de	1871		
Victor, F.	1860	Ganachaud, E.	1871		
Mallet, F.	1861	Elie, J.	1871		
Ducray, V. G.	1861	Lastelle, F.	1872		
Gautray, C.	1861	Leblanc, W.	1872		
Sicard, N.	1862	Margeot, E.	1872		